ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

TUESDAY, AUGUST 26, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations in the Capitol, at 10 o'clock a. m., Senator Irvine L. Lenroot presiding.

Present, Senators Lenroot (acting chairman) and Chamberlain.

STATEMENT OF MR. SAMUEL T. ANSELL—Resumed.

Mr. ANSELL. Yesterday I was requested by the committee to put into the record a letter to which I had referred, it being a letter from the Judge Advocate General of the Army to the senior judge advocate in France, the judge advocate upon the staff of Gen. Pershing, written practically contemporaneously with the submission of his proposed legislation to the Congress, whereby there was to be established a revisory power in the President of the United States. I said yesterday that this was part of the abundant evidence to prove, to my mind, that the Judge Advocate General of the Army and the War Department were not acting in good faith in making that proposition to Congress. I said that that letter showed expressly and in terms that the adoption of general order No. 7, which was a partial and ineffectual exercise of revisory power to the extent of requiring the commanding general below to withhold the execution of sentence in certain cases, was simply an administrative makeshift, intended to head off a more thorough and drastic reform.

I submit that letter, as I promised yesterday I would do, for the record.

APRIL 5, 1918.

Brig. Gen. WALTER A. BETHEL,
American Expeditionary Forces, France.

MY DEAR BETHEL: I am going to spend the necessary time out of a very busy day in an attempt to clear up the situation in respect to the establishment in France of a branch of the Judge Advocate General's Office, regarding which matter there seems to have been more or less misapprehension at your headquarters. You are, of course, familiar with the cable correspondence which has passed on the subject. For your convenience in reference, however, I inclose a copy of a memorandum that I have had prepared for the Chief of Staff, in which that correspondence is reviewed and set out in sequence.

First, let me say that it is difficult for me to understand why, upon receipt of the two cablegrams of January 20, 1918, one cabling Gen. Pershing the contents of General Order No. 7, and the other designating you as Acting Judge Advocate General, the branch office of the Judge Advocate General was not

immediately established. I assumed that it was in operation from that time, and continued of this view until the receipt of Gen. Pershing's cablegram of February 25, 1918, wherein he says:

"Brig. Gen. Walter A. Bethel has not established branch office and will not do so pending further instructions."

This leads me to comment upon the situation which is presented by Gen. Pershing's cablegram No. 779, which seems to imply some dissent from the action here taken in establishing the branch office. He appears to view it as a possible obstruction to the administration of military justice and as a mistake of judgment.

I wish you would assure Gen. Pershing (whom I would address directly but for the reason that I know he has no time to read letters) that every thought of this office, and I believe every thought of the War Department, is directed toward the discovery of ways and means to help him in his enormous task; that our idea was to expedite and not delay, and that he will understand better the occasion for this order if he will consider the following:

Prior to the issue of General Order No. 7 it had become apparent that, due to the large increase in commissioned personnel, which included many officers with little or no experience in court-martial practice, a large number of proceedings were coming in which exhibited fatal defects. A congressional investigation was threatened and there was talk of the establishment of courts of appeal. The remedy for the situation was immediate executive action which would make it clearly apparent that an accused did get some kind of revision of his court-martial proceedings other than the revision at field headquarters, where these prejudicial errors were occuring. At this point permit me to say that very few errors have been discovered in cases coming up from your headquarters. It was primarily with reference to errors occuring at field headquarters other than in France that this step was taken.

Accordingly we formulated the scheme of General Order No. 7. The Secretary of War gave personal consideration to the matter and on three or four occasions discussed it exhaustively with this office. He finally approved the order and contemplated, as I did, the establishment of the branch office promptly upon the receipt of our two cables of January 20. I may say here that at other headquarters the scheme has worked beautifully. It has silenced all criticism, and I believe that no invalid sentences are now beyond the reach of remedial action.

Your own intimate knowledge of court-martial procedure makes it quite unnecessary for me to enter upon a lengthy discussion of the merit of the new system which, I feel quite sure, will not fail to commend itself to you as a substantial step in the right direction. As stated in my memorandum to the Chief of Staff, it is believed that had Gen. Pershing fully understood the purpose and operation of General Order No. 7 his cablegram No. 779 of March 24, 1918, would not have been sent. I trust that the cablegram which I have recommended be sent him in reply, a draft of which is contained in the concluding paragraph of the inclosed memorandum, will serve to convince him of the wisdom and propriety of the issue of this order and that the procedure it contemplates will materially aid rather than obstruct the prompt and efficient administration of military justice in the American Expeditionary Forces.

With best wishes, I am,

Very truly, yours,

E. H. CROWDER,
Judge Advocate General.

Yesterday I was also requested to put into the record the opinions and memoranda evidencing my efforts at the beginning of the war to subject courts-martial to legal restraint through the establishment of a revisory power in the office of the Judge Advocate General or elsewhere in the War Department, and likewise the memoranda prepared by the Judge Advocate General and the Secretary of War, supported by the concurring views of the then acting Chief of Staff and Inspector General of the Army, in opposition to such a power, and in which they contended, first, that no such power did exist under the law, and secondly, that no such power ought to exist.

I regarded all those gentlemen as thoroughly reactionary, and I said so at the time, and I think the subsequent course of the admin-

istration of military justice during the war will amply justify that statement. They contended that no such power ought to exist, because in order to secure discipline a commanding general should control courts-martial and should be permitted to do with them as he pleased. These documents I have already placed in this record.

In order that this committee may more clearly see what was at issue then and what is at issue now, I would like to read the points that were made by me in this opinion—and when I say "me" I am not speaking personally; I am speaking for the office of the Judge Advocate General as I presided over it—an opinion in which every officer in the department at the time, except Gen. Crowder, who was in fact detached, agreed. I have inserted in the record this brief in support of the original opinion; but wishing you might know the points that were made, I will briefly read them, although these points, of course, need not be taken down.

(Mr. Ansell here read to the committee from page 45 of the hearings before the Committee on Military Affairs of the United States Senate on trials by courts-martial, the same being part of the hearing of February 13, 1919, which the stenographer was directed not to report.)

Mr. ANSELL. I wish to say here for the benefit of the record, that the Texas mutiny case, so called, was finally disposed of by a memorandum of the Secretary of War which will be found among these exhibits in these Senate hearings. Here it is. It reads as follows:

NOVEMBER 27, 1917.

"As a convenient mode of doing justice exists in the instant cases, I shall be glad to act in reliance upon a usual power and leave this larger question for future consideration, informed by the further study which the Judge Advocate General is giving it. Ordinarily, however, the extraction of new and large grants of power by reinterpreting familiar statutes with settled practical construction is unwise. A frank appeal to the legislature for added power is wiser.

BAKER."

I wish the committee to notice the confusion that obtains in the War Department, a confusion which seems to me does not do credit to a man of ordinary intelligence, not to mention a lawyer, to the effect that mercy or clemency—and military clemency is of the very mild kind known as the remission of military penalties—is or can ever be "a convenient mode of doing justice." The Secretary of War, I think, did act under a misapprehension here. At that time, I know from personal conferences with the Secretary of War, he did not appreciate the real purpose and legal effect of pardon, and especially this kind of pardon. He was content, however, to be imposed upon, to be advised that notwithstanding that he conceded this trial was all wrong, that the men ought never to have been tried at all, that the judgment was illegal and, if there had been any possible way of doing it, should have been set aside, and the whole prosecution dismissed, nevertheless he could do nothing to reverse the illegal conviction but would let it stand, and employ as a full measure of justice the convenient method of remission.

Now let us see what situation it left those men in, men of from three to twenty years' service; noncommissioned officers. If they were the right kind of noncommissioned officers—as they were—they were just as proud of their warrants, and ought to have been, as I was of

my commission as brigadier general. They are entitled to the same respect. They are an essential cog in any military machinery. Noncommissioned officers are wonderful men when they are the right kind of men; men of natural leadership, far more so than many of our officers upon whom the stamp of sovereignty has been conventionally placed, and who have not worked up or given any evidence of leadership. These men were branded as mutineers by the judgment of a court, irrevocable. Their service terminated that moment; their enlistment was cut short; the continuity of their service was interrupted; their continuous-service pay had been taken away from them.

Now, upon the advice of the Judge Advocate General—and I evidence this only to give you a fair insight into the appreciations that the War Department has for justice to the individual—the Secretary says to these unjustly convicted men: "I will do convenient justice; I will permit you to reenlist." They had been out of the service all of the time that had elapsed between the date of the trial and the time that I brought this matter to the attention of the War Department and it finally decided to take this action. The Secretary said, "I will permit you to reenlist under a statute which says that when a man has been properly convicted and the Secretary of War believes that he has actually expiated his offense and has come back and has shown that he is a good man, the Secretary may then waive the inhibitions placed upon his reenlistment by the Act of 1894, to the effect that no man who has been dishonorably discharged from the Army can be reenlisted therein." So the Secretary and his Judge Advocate General, in doing justice conveniently, proceeded upon the ground that these men were of the felonious type and had been properly discharged, and then found by way of fiction that they had rehabilitated themselves. Thus these men are graciously permitted their reenlistment as privates, in an army from which they had been illegally expelled, and in which they can start to work up again. They lose, besides, their right to continuous service and continuous service pay. So that the net result is that they are put back into the service by this straining of the statute, in order to do some justice to the men, but they lose their continuous service, they are branded, they have to start in as privates again, and they are really marked men, which I think we can all understand.

Senator LENROOT. Does that also affect their retirement status?

Mr. ANSELL. Their retirement?

Senator LENROOT. Yes.

Mr. ANSELL. No, Senator; retirement is presumed to be the most honorable of——

Senator LENROOT. No, but I mean as to the benefits after retirement, they having been out of service and then reenlisted.

Mr. ANSELL. No; because that depends upon a certain number of years——

Senator LENROOT. Upon the number of years in service?

Mr. ANSELL. Yes.

Senator LENROOT. And it would affect their retirement as noncommissioned officers?

Mr. ANSELL. Yes, certainly; though if at the time of their retirement some commissioned officer should happen to be favorably disposed, he might promote them and pass them for retirement.

But anybody could see that men are desperately prejudiced by such a situation as this. Now, it was a strange thing to me that I should have to argue with the authorities of the War Department that this, however convenient, was not a full measure of doing justice in the instant case. I say it is strange to me that you have to argue with any man that forgiveness of sin was what those men needed, when concededly they had committed no sin; that they were asking pardon for transgression of a law they had never violated. In my mind it is absurd. Yet I use this case to illustrate what has been done already in between 6,000 and 7,000 cases, since flagrant war was over, by the special clemency board, and of which I was, until I resigned, the head, nominally at least.

I was responsible that that much justice be done the thousands illegally convicted. It is a convenient but poor meed of justice.

The War Department takes great pride in the fact that they have applied this remissive clemency to the point where they have reduced these illegal penalties 87 per cent. The average period of confinement for every person imprisoned as the result of the sentence of a general court-martial was 7.6 years, including all offenses, many of them trivial. The average was 7.6 years, excluding, of course, the imprisonments for life and those sentences resulting from commuting death sentences into imprisonment. They have reduced those sentences until the imprisonment left is less than 13 per cent of the original sentences, and the hue and cry goes abroad by proclamation, "See how lenient we are," when, as a matter of fact, applying not over-meticulous tests, but the test that a man of trained legal intelligence must apply in order to achieve essential justice, more than 60 per cent of those cases were so badly tried that no man—no fair-minded and intelligent man—could say that the records can be relied upon to sustain any punishment.

Now, the War Department hates to admit that the basic motive for clemency is to be found in the illegality or the unreliability of the proceedings, but has advertised to the world that the proceedings were correct, and that these punishments had to be given *in terrorem*. The department says that now that the war is over we can afford to reduce them. Of course, the department has been compelled to do something, and has done no more than it was compelled to do.

Senator CHAMBERLAIN. But the exercise of clemency does not remove the stigma of guilt, even where there was no evidence to sustain it.

Mr. ANSELL. I am glad you brought that up, sir, because the proclamation goes forth now that the sentence of dishonorable discharge is, as a rule, remitted.

Senator LENROOT. I suppose it would be true, would it not, that in time of war a very much more severe sentence in a given case might be proper?

Mr. ANSELL. Why, certainly, owing to the circumstances. For instance, I can conceive, as I think we can all conceive, that sleeping on post in the immediate presence of the enemy is an entirely different proposition from sleeping on post, during this war, in the southwest.

Senator LENROOT. Or being absent without leave?

Mr. ANSELL. Or being absent without leave, yes; exactly so. Therefore there must be tolerably large discretion as to penalties that will enable these courts to take care of the circumstances surrounding the offense. But in this matter I again call your attention to the report of the Kernan Board to which the Secretary of War himself has just given unqualified approval. They have abandoned what I had supposed to be not only the good old American, but the commonsense doctrine that the punishment ought to be graduated to fit the grade of the crime, and they say you can not grade military offenses.

They took, for instance, the case that I cited before the committee last spring, which was a case of a man having disobeyed the order to "stop smoking that cigarette," in the highly hostile environment of a New Jersey camp. You can picture the situation; a lot of troops, green men, undergoing training and instruction. Some of them were detailed to do kitchen police, rather removed from the formal exactions of the military requirements. They were cooks, waiters, and so on. Nothing was hardly more natural than that a boy who was used to smoking cigarettes should put a cigarette in his mouth. There was not a powder factory around there or a gasoline tank, or anything of that sort. There was simply a kitchen.

Some officer who had been in the service less than three weeks—although I will assure you that some of them who have been in the service no less than 30 years give similar orders—saw this youngster with a cigarette and said, "Stop smoking that cigarette." Offensive, I suppose, to the kitchen! He had a package of cigarettes in his shirt pocket. "Give me those cigarettes." Well, the youngster said, "What have you got to do with it? I will not give you my cigarettes, and I am not going to stop smoking this cigarette." What was the result? That boy was tried by court-martial and was sentenced to be dishonorably discharged from the Army and to 25 years' imprisonment. The Kernan Board likened that to a canker or to gangrene that the surgeon must cut out lest it spread to the whole military body and result in death to the Army.

Now, I submit that that is absurdly far-fetched, and that you can not apply any such hard and fast rule as that. That is the trouble. Whenever a government does not discriminate between disobedience of orders as committed under the circumstances designated here, and disobedience of an order to a man to take his rifle and fire or charge at the enemy on the firing line, then it is likely to lose the respect and the loyal sentiments of intelligent men.

Senator CHAMBERLAIN. A summary court-martial was all that was necessary, if anything, in a case like that.

Mr. ANSELL. Nothing was necessary, Senator, but the application of a little common sense.

Senator CHAMBERLAIN. I say, if anything was necessary.

Mr. ANSELL. They talk a great deal about the experience that a man must have had in the line before he is competent to express an opinion upon discipline and disciplinary methods, but I wish to say to the committee, and for no other purpose than attempting to qualify according to their own standards, that I, at the time I had come to Washington here, had seen as much service with troops

as any of our generals with the exception of about three. I commanded a company from the time I left the Military Academy for three years, and then for two years more; and many of these generals had done no more and many less; and I congratulate myself that I commanded it without a resort to courts-martial, even summary courts, except in the rarest instances. Now, they come here and would have you simply be impressed by their expertness. I should hope that the committee might remember the lawyer's adage that you should never be afraid to cross-examine your expert, and especially your military expert. They are the "easiest" experts in the world.

Take our generals. The mere fact that a man is a major general, or certainly the mere fact that he was a major general up to the beginning of this war, when some of them did see some service, was indicative of little more than a long time conformance to a system which in itself tended to arrest mental and professional development. It is a well known fact in the Army, a fact obvious to any man who has ever served in it, that the weakest grade in the Army of the United States is the grade of general officers. Why, the curve from the time those gentlemen leave West Point until the time they retire would run up, reaching its height probably 10 or 12 years after their graduation from the military academy, during which period the mere incapacity of youth to conform easily to these established rules, and the power of youth to retain some mental resiliency, enable a man to advance, and then drops almost abruptly downward until it about reaches the zero line. I think I might be permitted to say, because with entire accuracy it can be said, that many of our generals are jokes to everybody else in the world except ourselves and themselves.

So the very gentlemen who make this Kernan report, and who testified before the committee of the American Bar Association, have reported to the War Department, and will have the temerity to appear before this committee and tell it, that all of this criticism is uninformed opinion. That is what they call it, "uninformed opinion." Senator Chamberlain's opinion is uninformed! My opinion is uninformed! I have seen quite as much service in the line as most of them, and have had a hundred times their court-martial experience, as a member of a court, as the prosecutor, and as counsel for the accused. No man in the Army has had my court-martial experience. But, above all, as Acting Judge Advocate General, in a sense, during this war, sitting at the office where all these lines of discipline finally met, I kept tab on every division and every court-martial in every locality. Assuming a man to be a man of fair intelligence and competency and interest, what better place could he have found to observe and form an intelligent opinion upon the state of discipline in the Army than that office to which all these records came, the office charged with the duty of looking over them and ascertaining what they really meant? Ten thousand outcries from the victims, "Uninformed opinion!"

Senator LENROOT. I do not quite follow you, General, as to lack of experience of general officers in the line.

Mr. ANSELL. Where have they had experience, Senator, might I ask? Look at our Army. Up until the beginning of this war it was

scattered throughout the country in small garrisons, so that a man as a line commander seldom or never commanded anything larger than a company. From there he went to command a body of territory known as an Army post. He seldom went with troops. He engaged himself largely in looking out for the post and conforming to the thousand and one details of the care of the post, including landscape gardening. If he should have been so fortunate as to be promoted to the rank of brigadier general in his later days—and I assure you that this kind of life did not tend to develop men with the quality of leadership which must be developed to make real commanders of men—he became then a department commander, again commanding territory, and sitting in a chair at his desk, as much so as any lawyer sits at his chair at his desk, and busying himself with the thousand and one administrative requirements that simply clog our peace-time administration of the Army—red tape, as it is called.

Senator LENROOT. I understand that, but I had assumed that every general officer must have had a considerable experience as a company commander.

Mr. ANSELL. Yes; as a company commander.

Senator LENROOT. What would be the average length of time that an officer would have been a company commander before he got out of touch——

Mr. ANSELL. Since the General Staff act went into effect in 1903 the best officers of our Army have spent a large part of their time on detached duty and staff duty; but the point I was making was not so much the length of time when a man commanded as it was the number of men that he commanded and the character of the command. To say, for instance, before the beginning of this war that a major general commanded the Department of the East meant no more than to label that man as a chief administrator, a paper man, a red-tape artist, and that is all there is to it.

Senator CHAMBERLAIN. Was there a single general officer that had ever commanded a division prior to our entrance into this war?

Mr. ANSELL. Senator, we never had a division prior to our entrance into this war. We labeled that heterogeneous collection of troops on the Mexican border at one time a division, which Gen. Pershing commanded. But no professional soldier would ever call that a division.

Senator CHAMBERLAIN. Have we many general officers who had experience in the Spanish War?

Mr. ANSELL. No; very few. Your mind, of course, goes at once to Gen. Wood, who was the most distinguished of them, who was a regimental commander in that war.

Senator CHAMBERLAIN. Regimental?

Mr. ANSELL. Yes; after Col. Roosevelt. And, of course, you have Gen. Pershing, who had such command as we had in the Philippines. The command in the Philippines was not the kind of command that required general leadership such as this war required, for instance. It was a bushwhacking, guerilla, all the time.

The only point that I make is that we ought not to get the idea that merely because a man is labeled a major general he is of such superior quality that his word must be taken and he must not be subjected to the cross-examination which an expert ought to be subjected to, because I will assure you that I am quite as good a man as a

lieutenant colonel as I was when I was a brigadier general; and the experience is about the same.

Senator LENROOT. That is to say, in your opinion he is no better qualified than a captain would be?

Mr. ANSELL. Less qualified, I think I should prefer a captain who is in immediate contact with his men.

I have taken a great deal of time on this. It is a matter that I had wanted to say, however.

I had commenced reading the points of this brief. [Reading:]

II. It is as regrettable as it is obvious that those who oppose my views do not vision in the administration of military justice what the new Army of America will require, nor do they even see what the present is revealing. They are looking backward and taking counsel of a reactionary past whose guidance will prove harmful if not fatal.

The first of the several points under that is:

(1) The views of the Assistant Chief of Staff and the Inspector General savor of professional absolutism.

And they did. I have never known men to have such crystallized views. To undertake to point out the difference between the old Army and the new Army to those men was to talk to men who simply could not understand. They would not consider it. [Reading:]

(2) The opposing legal views are anachronistic; they are given a backward slant through undue deference to the theory of an illustrious text writer as to the nature of courts-martial, a theory which civil jurisprudence has never adopted but distinctly denied.

I have referred there to an officer whom you gentlemen will hear more of if these hearings are to include calling those who insist upon supporting the existing system—Col. Winthrop, who was, indeed, the Blackstone of the Army, a man of great capacity to express himself, and who was also a keen legal reasoner. But Col. Winthrop was first a military man, and he accepted easily and advocated the view that courts-martial are not courts, but are simply the right hand of a military commander. The best reason that that author ever gave for that view—the best legal reason—was what I adverted to yesterday. He said that they are not a part of the Federal judiciary because they are not organized under the judiciary clause of the Constitution, which of course is obvious, and then he follows that with a *non sequitur*, "therefore they belong to the power of military command, an executive agency;" when, of course, that same line of reasoning would have led to the conclusion that the territorial courts are not judicial bodies at all, are not governed by law, but are executive agencies, because they, too, are not organized under the judiciary clause of the Constitution but under the territorial clause, by Congress, empowered to govern the territories and dispose of them; and since the courts of the District of Columbia here are not organized under the judiciary clause of the Constitution, but under that clause of the Constitution that empowers the Congress to set aside this District here and govern it, they, too, are not courts but executive agencies. Obviously, it would be anarchy to hold that these courts are not courts because they are not the usual Federal courts that we have. They are courts, and are governed by principles of law just as much as the Federal courts are.

I will hurriedly pass over the points in my Brief on Revisory Power. The first point of the brief was as follows:

I. The action taken by the Secretary of War on the advice of the Judge Advocate General has been taken under very evident misapprehension. Such action is predicated upon the correctness of conviction, and the acceptance of such an act of grace by these innocent men necessarily implies a confession of guilt of a crime, which, upon well-established principles of law and justice, they never committed. Justice is a matter of law and not of executive favor.

That seems obvious. The second point is as follows:

II. It is as regrettable as it is obvious that those who oppose my views do not vision in the administration of military justice what the new Army of America will require, nor do they even see what the present is revealing. They are looking backward and taking counsel of a reactionary past whose guidance will prove harmful if not fatal.

And under this point I discussed these propositions:

(1) The views of the Assistant Chief of Staff and the Inspector General savor of professional absolutism.

(2) The opposing legal views are anachronistic; they are given a backward slant through undue deference to the theory of an illustrious text writer as to the nature of courts-martial, a theory which civil jurisprudence has never adopted but distinctly denied. (See Dynes *v.* Hoover, 20 How, 82; Keyes *v.* U. S., 109 U. S., 340; McClaughry *v.* Deming, 186 U. S., 62.)

(3) The teachings which followed upon the premise that courts-martial are executive agencies have all been disproved by the Supreme Court of the United States, though this department still clings to them.

Those teachings were:

(*a*) That courts-martial were not courts at all in any proper sense of the term;

(*b*) That, therefore, they tried an act in its military aspects alone and not the full resultant crime recognized as such by general public law;

(*c*) That, therefore, judgments of courts-martial could not be pleaded by a soldier in bar of trial by a Federal court; and

(*d*) Being executive agencies, they are subject to the power of command.

Those teachings were all wrong, and the sooner we abandon them the better.

(*a*) Courts-martial are courts created by Congress, sanctioned by the Constitution, and their judgments are entitled to respect as such. (Runkle *v.* United States, 122 U. S. 543, 555; McCloughry *v.* Deming, 186 U. S. 49, 68; Ex parte Reed, 100 U. S. 13, 21; Swaim *v.* United States, 165 U. S. 558; Keyes *v.* United States, 109 U. S. 336, 340; Grafton *v.* United States, 206 U. S. 333, 348; Smith *v.* Whitney, 116 U. S. 167, 178.)

(*b*) Courts-martial do not try simply for the crime in its military aspects, but for the full and complete offense as recognized by the law of the land. (Ex parte Mason, 105 U. S. 696; Carter *v.* Roberts, 177 U. S. 496; Carter *v.* McCloughry, 183 U. S. 365; Grafton *v.* United States, 333, 348.)

(*c*) The judgment of a court-martial being a complete adjudication by a competent tribunal of the offense as known to the law of the land, is a bar against a second trial in any court of the United States. (Grafton *v.* United States, 206 U. S. 333, 348.)

These cases prove conclusively that a court-martial is a judicial tribunal of vast powers, whose jurisdiction extends to all who may belong to or are retained in our forces, affecting the life and liberty at the present time of millions; and that this jurisdiction extends to all conduct of such persons, without distinction between civil and military aspects. This office and the Army prior to the Grafton case had regarded it as settled law and justice, and sternly opposed the contrary view, that a soldier, though tried and punished by court-martial, could again be tried and punished by Federal civil courts without infringing his constitutional rights and his rights to justice.

I think there is nothing more difficult to understand in this world than the great gulf between the Army and our civil functions of government. There is nothing more obvious to the lawyer than this, that the War Department says that courts-martial are one thing, fundamentally, and the Supreme Court of the United States upon

every opportunity says diametrically the opposite; and yet the contact between civil and military authority is so remote that the military view, as a practical matter, dominates, and there is no way of checking it. There is no way that a civil court of the United States can impose its view upon a military court except in the one case where the military court is absolutely destitute of jurisdiction, and a man imprisoned by its judgment applies for a writ of habeas corpus and thus gets a collateral review of the judgment of the court-martial.

Senator CHAMBERLAIN. You mean under the law now?

Mr. ANSELL. Yes; I mean under the law now.

Senator CHAMBERLAIN. But Congress has the power to bring about a change.

Mr. ANSELL. Absolutely; it is a remarkable fact that the courts-martial of England are subject to review by the civil courts not only by way of the writ of habeas corpus but by writ of certiorari, by the writ of prohibition, and by the other common-law remedies; that the relation of military justice to the civil judicial authority there is such as to permit that course. Of course, the civil authority is rather reluctant to intervene, as, indeed, it ought to be.

Senator LENROOT. At some point in this hearing could you put in the English articles of war as they now exist?

Mr. ANSELL. It is called the Army Annual Act, nowadays. The old term has been abolished.

As showing you the inherent, fundamental character of a court-martial as reviewed by the Supreme Court of the United States I would refer you to the following cases:

Runkle *v.* United States, 122 U. S. 543, 555; McCloughry *v.* Deming, 186 U. S. 49, 68; ex parte Reed, 100 U. S., 13, 21; Swaim *v.* United States, 165 U. S. 558; Keyes *v.* United States, 109 U. S. 336, 340; Grafton *v.* United States, 206 U. S. 333, 348; Smith *v.* Whitney, 116 U. S. 167, 178.

Ex parte Mason, 105 U. S. 696; Carter *v.* Roberts, 177 U. S. 496; Carter *v.* McCloughry, 163 U. S. 365; Grafton *v.* United States, 333, 348.

To show you how far removed we of the Army are from civil appreciation, I would cite a leading case in military law, the Grafton case. (Grafton *v.* United States, 206 U. S. 333, 348.) There was involved in that case an issue in which I was then and still am deeply interested, and that is, the very character of these courts-martial, and how far those principles of the Bill of Rights and the other principles of the law—common law, Anglo-American law—are applicable to these courts-martial, in order to secure a fair trial. I say this was the issue involved. Speaking concretely, the issue was whether a man who had been once tried by court-martial and subsequently tried by a civil court of the Philippines under the sovereignty of the United States, was entitled to the protection of that clause of the Constitution against double jeopardy. It had long been and still is the contention of the so-called lawyers of the War Department that not one single clause or legal principle in the Constitution, in the Bill of Rights, or any other of these ancient documents that have come down to us as a part of our birthright, to secure our liberties against government, not one is applicable to courts-martial—including this great protection against second trial. Here are two courts springing from a common sovereignty, the court-martial and the civil court of the Philippines. This soldier had been tried and acquitted by a court-martial of manslaughter.

The civil courts, rather antagonistic to that course and to the military authorities, anyway, took jurisdiction, indicted the man for murder, and proceeded to try him for the same homicide. The authority of the lower courts was to the effect that courts-martial tried not for the general offense against the law of the land, but simply for a violation of the special code—the code of the Army. That is, if a soldier killed another soldier, or somebody else for that matter, and the military authorities took jurisdiction, they took jurisdiction to try him not for murder or some other degree of unlawful homicide against the general law of the land, but for that violation of this special military code here, and tried him in the military aspect, leaving the civil court to try him for the general civil aspect; and that was the general War Department view, flowing, of course, from the fact that courts-martial are not courts but are simply military agencies designed to redress the injury according to the will of some commanding officer, and that view had been so imposed, so circulated, so ably supported by organized government, namely, the War Department, that many of the lower courts had adhered to it.

So this case, the Grafton case, brought up the very question. I applied to be counsel for Grafton in that case because we were all contributing money to hire him counsel, and I was not able to contribute very much. A great question was involved and I wanted to present it; and the War Department would not permit me. But the court held in that case that a court-martial was a court; that the offense for which this man had been tried was the offense against the law of the land, notwithstanding the fact that the authority for trial sprang out of these Articles of War, and that no other court of the same sovereignty could come along and try him again for the same offense without placing itself in the way of this inhibition against double jeopardy, and dismissed the entire proceedings.

The court took occasion to say this:

> We base our decision not upon the fact that this clause of the Constitution of the United States has been carried to the Philippines by congressional enactment; we do not base this decision upon the fact that Congress has enacted, in the old fortieth article of war, an inhibition against double jeopardy. We base it upon the fact that the Constitution of the United States applies, regardless of legislation.

And yet, apparently, the Judge Advocate General's Department of the Army up until recently had never seen the great point of that case. They would not permit the disapproval of a court-martial proceeding upon the ground that the fundamental rights of the man had been violated, because they contended that the fundamental rights of a man before a court-martial were not fundamental rights; they were not rights guaranteed to him by the Constitution, at all. In other words, the measure of right that a man had before a court-martial was to be found in what Congress had mandatorily declared to be the right of the man. But the Supreme Court said that if Congress, even with its full power to make rules and regulations for the government of the Army, should undertake to say that a man could be tried a second time for the same offense, it would be restrained by this constitutional clause against double jeopardy.

Senator CHAMBERLAIN. You said that that view was entertained until recently. What did you mean by that?

Mr. ANSELL. I mean by that, that I as Acting Judge Advocate General fought, backed by the authority of the Grafton case, to the point where I have gotten a partial recognition, at least, of these rights, the right to counsel, the right to a fair trial, the right to have witnesses.

Senator CHAMBERLAIN. Only recently the President, within the last month, I understand from the press has issued an order that no commanding officer hereafter should disapprove and send back the papers in a case and order a retrial of a man who had been acquitted.

Mr. ANSELL. Yes; although that has been agitated for 18 years, I know, and the War Department has insisted that that was a proper thing, and the Judge Advocate General of the Army, in the very hearings before the committee, beginning in 1912 and terminating in 1916, insisted that that was a proper thing, that it was necessary for discipline; and when he sent the bill to your committee in the spring of 1918 conferring this revisory power, he went before the House committee and argued for the advisability of permitting this court to reverse acquittals, and he said that he had seen many instances in his service where justice would not have been done if the acquittal had been adhered to.

Senator LENROOT. I assume, General, that if Congress did in fact vest final and conclusive jurisdiction in a court-martial, it would be competent for Congress to do that?

Mr. ANSELL. Certainly, notwithstanding the Kernan learning. There is nothing fundamental about an appeal, but it is very necessary of course for the correction of error.

Senator LENROOT. Oh, yes, of course.

Senator CHAMBERLAIN. Under the decision of the Supreme Court in the Grafton case, even if Congress undertook to take away that right of a man not to be placed twice in jeopardy, the act of Congress would not be sustained by the court?

Mr. ANSELL. No; it would not be.

Senator LENROOT. Of course not.

Mr. ANSELL. But, as I say, it is very difficult to determine upon judicial authority how much of this existing judicial code is fundamentally wrong, because, again, except by way of habeas corpus we have no way of testing it. They can only say that every time the Supreme Court has spoken on the subject it has spoken a view diametrically opposite to that which the War Department insists upon adhering to.

Point 3 of the brief is as follows:

> III. The whole argument on the other side is found in the contention that the word "revise" has no substantial meaning, but has reference only to clerical corrections. One single fact exposes the utter fallacy of that contention, and had it been considered must have prevented an expression of that view. That fact is this: The word "revise" is an organic word which solely creates and defines the duties of an entire bureau. Congress went to the great length of creating an independent bureau in the War Department for the sole and declared purpose of having it "revise" the proceedings of all military courts, and made that duty of revision the sole duty of that bureau.

Gentlemen, if there ever was a plainer case of a statute speaking by history, and bearing also upon its face its unmistakable meaning, it has never been brought to my attention. Congress was so interested in military justice during the Civil War that it created separately

from the office of the Judge Advocate General a Bureau of Military Justice, so denominated, but it made the Judge Advocate General the chief also of that bureau. The only purpose it had in this world for creating that independent bureau of the War Department and equipping it with officers was to see that these court-martial judgments were revised. Congress used language that was technical and brief, and did not carry to the mind of the man who would not see its real meaning. Congress said the Chief of Military Justice should "revise" proceedings of courts-martial. The War Department at first insisted that meant a clerical revision. What in the world anybody would want clerically to revise the proceedings and judgment of any court for, unless it was going to be of benefit to the man who was undergoing sentence, I can not see.

Then, when the fallacy of that position was exposed, they said that it did confer upon the Judge Advocate General the power to study a case and make a recommendation to somebody.

Senator CHAMBERLAIN. And, in case of a lack of jurisdiction, to set it aside?

Mr. ANSELL. Oh, yes; to set it aside; but saying, inconsistently, it seems to me, that he could study and he could recommend, but if the commanding general had already approved, it had passed beyond any power of correction.

Senator LENROOT. When did the construction of this statute first arise after its enactment?

Mr. ANSELL. I have it in this brief, Senator.

Senator LENROOT. I would like to have you give it.

Mr. ANSELL. I am glad you asked the question. It arose, I think, the first time in 1887.

This is the fourth point in the brief (reading):

IV. "Revise" in its every sense—ordinary, legal, and technical military sense—means to correct, to alter, and amend.

The fifth point is as follows:

V. The word "revised," as a matter of fact, is in no sense ambiguous, and there is no room for construing it. It would have made no difference, therefore, what the administrative practice was or is. The quality of law is not impaired by nonuse. As a matter of fact, Judge Holt did, in form at least, pronounce sentences invalid, and did not content himself simply with recommending that pronouncement was by superior authority. His views as to the validity of proceedings were expressed in terms that savor of judicial pronouncement, and the orders of the War Department so far as examined seem to respect that quality by confirmance.

The sixth point is as follows:

VI. The judge advocate general of England certainly did have this power of revision. (I am not advised of his present authority)

The seventh point is as follows:

VII. Whence comes the established power to declare proceedings null and void for jurisdictional error? And why should not the larger power include the lesser radical one of correction of legal error?

The eighth point is as follows:

VIII. The necessity, in the name of justice, of locating this power in this department, and preferably in this office, where logically, and I think legally, it belongs, must be apparent to all who are familiar with the administration of military justice.

I would like to read to this committee the comment under the last point of this brief [reading]:

Courts-martial are courts dealing with the right of life and liberty of all who are subject to their jurisdiction, a number already beyond a million, doubtless soon to pass into many millions, of our citizens. They are courts of law administering the law of this land, in accordance with the law of the land, for a great national purpose. Their judgments are judgments of law. Can it be said that their judgments are beyond all legal inquiry; that though they may be arrived at in contravention of all law, if the court, according to the usual narrow jurisdictional tests had jurisdiction, the judgment, though concededly wrong for error of law, is beyond all correction?

There is to-day, as never before, an urgent, impelling necessity for such revisory power; if not here, then elsewhere. It will not do to say that such errors of law affecting the proceedings to the great prejudice of the accused and rendering the judgment bad because thereof, are rare, and for that reason may be ignored. That doubtless was the reason why the power was permitted to remain not fully used or to drop into desuetude. But this day finds the Army increased tenfold. A few more months hence it will have been increased twentyfold, and obviously a year hence the Army of the United States must necessarily, if we are to take the part in this war that this Nation purposes to take, consist of three millions of men. The officers of that Army must necessarily be largely untrained officers, conscious, of course, of their great power, required necessarily to exercise it, and exercising it necessarily without the most enlightened judgment or consideration. It will consist of men just come from the shops, the factories, and the farms, unused to Army life, with its peculiar customs and its rigorous duties, willing but uninformed. With such elements, errors upon the part of the officer on the one hand exercising disciplinary authority and on the part of the enlisted man on the other subjected to such authority, must be exceedingly numerous and resort to the disciplinary actions through the agencies of the court-martial frequent. The triers of the case will be officers of the same class, and so frequently will be the reviewing and approving authorities. Opportunity for resort to court-martial and opportunity for error in the courts-martial proceedings themselves will be largely multiplied over those that obtain in normal peace conditions. There is a chance for grave error in the most enlightened legal system, but still greater chance in a legal system which necessarily must be administered by men uninformed in the law, and an immeasurably greater chance in the case of such an army as ours must necessarily be. I must assume that no man with the interest of the Army and the country at heart and with the ordinary conception of the necessity of maintaining justice in our institutions could doubt the advisability and the necessity of establishing here or elsewhere such revisory power.

I have no shame in confessing that I feel strongly about this, and not in any contentious way. I am not impelled to file this brief because the Judge Advocate General of the Army disagrees with me, nor the Chief of Staff, nor other authority. I am entirely out of the field of contention. I feel strongly about it as a matter between a man and his fellowmen, between an officer and the men whom he should protect, between a man and the Army in which he serves, between a soldier and his Nation. What happened to these men can happen to me. A soldier has nothing but his service. He is honored by his professional reputation or dishonored by the lack of it. Society has established certain rules, which are its law and by which human conduct is tested. All lawyers, at least, understand the methods of applying those tests. If the test be not applied in accordance with the law, there has been no test. It is not sufficient to say that a system of administration of criminal justice may not be a fair and just system, though it provide for no appeal, though the fact remains that no enlightened system has ever permitted a judgment to remain as final when reached in contravention of the rules of law. The question here is whether or not, when, according to the well-understood principles of law and justice, a judgment is concededly and palpably wrong, it must remain and persist as the law of the land in condemnation of an individual while it is concededly wrong. It seems to me that a soldier, before suffering the extreme penalty of death or other serious punishment, should, on principle, be entitled to have the proceedings of his trial examined, not solely by the commander convening the court in the field, but by a separate and independent authority, who, skilled in the law, properly circumstanced, can with the necessary delibera-

tion and considerateness pronounce the trial free from prejudicial error. Even in the absence of statute it would be the duty of the department to endeavor to discover or provide a means whereby such a wrong could be righted. In the case that it could invoke a doubtful statute, it would be the duty of the department on all principle to resolve the doubt in favor of its jurisdiction to apply such a remedy. Surely there can be no excuse for the department's not taking the remedial action which the statute clearly authorizes, indeed, I think, requires it to take.

CONCLUSION.

This revisory power should exist; and I doubt not that when exercised with judicial wisdom and discretion, as it must be if it is a judicial power at all, under proper rules and regulations, it will prove a great help, and never a hindrance to safe and sound administration, and place military justice upon a plane that will cause it to merit and receive, more than it ever has heretofore received, the approval of the American people. I earnestly ask that this matter may be conceived to be, as doubtless it is, one of prime and fundamental importance to our Army. It is a matter affecting the relations of the Nation to its soldiery; it is a matter at the very base of military justice as an institution; it is a matter affecting justice under the law to the individual soldier. Justice under law is as necessary to the American Army as it is to any other American institution.

I should like to read into the record other memoranda of mine written after I was relieved in November, 1917, from my connection with the Division of Military Justice, memoranda which are closely connected with this question and in which I still sought to show the necessity and method of establishing such power, and in which I contended that the administrative palliatives could never prevent the terrible injustices which must inevitably follow any man-governed, lawless system of courts-martial.

(These memoranda appear elsewhere as Exhibits H, I, and J.)

Mr. ANSELL. Even in the early days of the war, and recognizing that commanding generals would exercise all the power that the department held to be theirs, still some of them thus early exercised the power so ruthlessly, and with such disregard for orderly administration, that I thought it advisable to call the most flagrant case to the attention of the Judge Advocate General and through him to the Secretary of War, which I did, and I should like to put that into the record. I will read you the letter. I do not like to use names, but I believe if you are ever going to correct this thing you have got to use names, and I will assume the responsibility for using the names of these officers.

Senator CHAMBERLAIN. I think they ought to be named.

Mr. ANSELL. This investigating a system and never touching somebody higher up, in my mind makes the investigation a farce.

On December 12, 1917, I filed a memorandum having to do with what I conceived to be the ill-judgment and the harshness of a major general in the Army, in command of one of our departments, an officer of my own corps, and that memorandum is this [reading]:

DECEMBER 12, 1917.

Memorandum for the Judge Advocate General of the Army.

Subject: Evidence of inefficiency of Maj. Gen. John W. Ruckman, commanding the Southern Department, headquarters at San Antonio, Tex., and of Col. George M. Dunn, Judge Advocate General's Department, the judge advocate upon the staff of Gen. Ruckman.

1. I feel it my duty to call to your attention what I conceive to be evidence of the incompetency of the two officers of the Army who are the subject of this memorandum with the intention and purpose that these views be brought by you to the attention of the Chief of Staff and the Secretary of War.

2. In a memorandum which I began work upon two weeks ago and which I completed yesterday (upon the revisory power of this office) I had occasion to advert to what I conceived to be convincing evidence of the failure of the department commander to exercise his power to prevent gross injustice to the enlisted men of his command who were charged with, tried for, and convicted of mutiny, and the proceedings of which trial were approved by him and the sentence carried into execution, notwithstanding such patent prejudicial errors as must have caused any competent official, certainly if competently advised, to discover such errors and because of them disapprove the proceedings.

3. Yesterday we were apprised, through the public press and for the first time, that Gen. Ruckman had proceeded summarily to execute the sentences of death in the case of 13 negro soldiers recently tried in his department. I shall not allude to this case further than to say that, under the circumstances surrounding this case which were such as to reveal themselves in all their bearings to a man of ordinary prudence and care, a man possessing the poise and sanity of judgment that should be necessary concomitants of the rank which this officer holds, could not have summarily carried into execution those sentences. Under the circumstances of this case the action taken by this commander was such a gross abuse of power as justly to merit the forfeiture of his commission.

4. I must assume that this general officer has sought and acted upon the advice of his judge advocate, Col. Dunn, and that this officer therefor has, in the same degree with Gen. Ruckman, manifested his incompetence at a critical time.

5. I am conscious also, though Maj. Davis will be able the better to advise you in this respect, that the administration of military justice in this command is generally below the standard of efficiency which should be required. A short while ago I was so impressed with this view that I had occasion to remark, "It seems to me the commanding general of the Southern Department never reads or interests himself in the judgments of his courts-martial."

6. The responsibility, of course, is not mine further than thus to advise you.

S. T. ANSELL.

Senator CHAMBERLAIN. Was anything ever done in reference to that?

Mr. ANSELL. No, sir; nothing.

Senator LENROOT. No reply was made to that letter at all?

Mr. ANSELL. No, sir. It is only fair to say that this particular general was not the only one. There were others who were manifesting the same tendency and disposition, even then, and they have manifested it in greater degree since. Of course, if we are once to concede that a commanding general can use these courts to do as he pleases, that he is the government and they are his agencies, I assume that, having conceded so much, we should not criticize any action that he takes; but I, for one, could never concede that.

Though it were to be considered as a War Department theory, it nevertheless seems to me that when a commanding general closes a case to-day and executes his men to-morrow morning in the cold gray dawn, in this country, 5,000 miles from the battle zone, he shows that he has not that quality which he ought to have to be a real leader of men or a worthy bearer of the major general's shoulder straps. Why, a decent regard for the orderly performance of such important duties, it seems to me, would require considerable time to intervene between the approval of a death sentence and the execution of the men. Those men, surely, assuming their utmost guilt, as I do assume it, had the right to compose their affairs. They had the right to appeal to the President of the United States for clemency. Time ought to intervene between the approval of any sentence of death and the execution of that sentence in order that a man may do these things.

Senator CHAMBERLAIN. It is not the law. now, that overrules that theory of the War Department, but an order which was issued as a result of the criticisms of the department?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. So that General Order No. 7, to which you refer, is not a law but is simply a regulation?

Mr. ANSELL. That is so.

Senator CHAMBERLAIN. And but for that regulation the commanding officer would still have the power to have a man executed within 24 hours after his sentence?

Mr. ANSELL. Yes.

Senator LENROOT. That General Order No. 7 has gone into the record, has it not?

Mr. ANSELL. I do not believe it has.

Senator LENROOT. It should go in.

Mr. ANSELL. I will put it in.

(The order referred to is here printed in full, as follows:)

GENERAL ORDERS, No. 169.

WAR DEPARTMENT,
Washington, December 29, 1917.

1. Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, the execution of such sentence shall be deferred until the record of trial has been reviewed in the office of the Judge Advocate General and the reviewing authority has been informed by the Judge Advocate General that such review has been made and that there is no legal objection to carrying the sentence into execution. The general court-martial order publishing the result of the trial shall recite that the date for the execution of the sentence will be hereafter fixed and published in general orders; and the fixing of the date of execution and the publication thereof shall follow the receipt of advice from the Judge Advocate General that there is no legal objection to the execution of the sentence. This rule of procedure does not relate to such action as a reviewing authority may desire to take under the fifty-first article of war.

GENERAL ORDERS, No. 7.

WAR DEPARTMENT,
Washington, January 17, 1918.

I. Section I, General Orders, No. 169, War Department, 1917, is rescinded and the following rules of procedure prescribed by the President are substituted therefor. This order will be effective from and after February 1, 1918:

1. Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, or one of dismissal of an officer, he will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with a recital that the execution of the sentence will be directed in orders after the record of trial has been reviewed in the office of the Judge Advocate General, or a branch thereof, and its legality there determined, and that jurisdiction is retained to take any additional or corrective action, prior to or at the time of the publication of the general court-martial order in the case, that may be found necessary. Nothing contained in this rule is intended to apply to any action which a reviewing authority may desire to take under the fifty-first article of war.

2. Whenever, in time of peace or war, any officer having authority to review a trial by general court-martial, approves a sentence imposed by such court which includes dishonorable discharge, and such officer does not intend to suspend such dishonorable discharge until the soldier's release from confinement, as provided in the fifty-second article of war, the said officer will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with the recital specified in rule 1. This rule will not apply to a commanding general in the field, except as provided in rule 5.

3. When a record of trial in a case covered by rules 1 or 2 is reviewed in the office of the Judge Advocate General, or any branch thereof, and is found to be

legally sufficient to sustain the findings and sentence of the court, the reviewing authority will be so informed by letter, if the usual time of mail delivery between the two points does not exceed six days, otherwise, by telegram or cable, and the reviewing authority will then complete the case by publishing his orders thereon and directing the execution of the sentence. If it is found, upon review, that the record is not sufficient to sustain the findings and sentence of the court, the record of trial will be returned to the reviewing authority with a clear statement of the error, omission, or defect which has been found. If such error, omission, or defect admits of correction, the reviewing authority will be advised to reconvene the court for such correction; otherwise he will be advised of the action proper for him to take by way of approval or disapproval of the findings or sentence of the court, remission of the sentence in whole or in part, retrial of the case, or such other action as may be appropriate in the premises.

4. Any delay in the execution of any sentence by reason of the procedure prescribed in rules 1, 2, or 3 will be credited upon any term of confinement or imprisonment imposed. The general court-martial order directing the execution of the sentence will recite that the sentence of confinement or imprisonment will commence to run from a specified date, which date in any given case will be the date of original action by the reviewing authority.

5. The procedure prescribed in rules 1 and 2 shall apply to any commanding general in the field whenever the Secretary of War shall so decide and shall direct such commanding general to send records of courts-martial involving the class of cases and the character of punishment covered by said rules, either to the office of the Judge Advocate General at Washington, D. C., or to any branch thereof which the Secretary of War may establish, for final review, before the sentence shall be finally executed.

6. Whenever, in the judgment of the Secretary of War, the expeditious review of trials by general courts-martial occurring in certain commands requires the establishment of a branch of the Judge Advocate General's office at some convenient point near the said commands, he may establish such branch office and direct the sending of general court-martial records thereto. Such branch office, when so established, shall be wholly detached from the command of any commanding general in the field, or of any territorial, department, or division commander, and shall be responsible for the performance of its duties to the Judge Advocate General. [250. 4, A. G. O.]

II. There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199, Revised Statutes, a branch of the office of the Judge Advocate General, at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in France, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the American Expeditionary Forces in France. The officer so detailed shall be the Acting Judge Advocate General of the American Expeditionary Forces in Europe, and shall report to and be controlled in the performance of his duties by the Judge Advocate General of the Army.

The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge and of all military commissions originating in the said expeditionary forces, will be forwarded to the said branch office for review, and it shall be the duty of the said acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon to the Judge Advocate General of the Army for permanent file. [250.4, A. G. O.]

By order of the Secretary of War:

JOHN BIDDLE,
Major General, Acting Chief of Staff.

Official:

H. P. MCCAIN,
The Adjutant General.

Senator CHAMBERLAIN. Can you remember, in a general way, about the date of that General Order No. 7?

Mr. ANSELL. About February; but it began—they first issued a little order, simply staying the execution of death sentences, a brief order, immediately after this affair; and then they began to work on a larger order to the same effect, which went no further than to stay the execution of the sentence of death.

Senator CHAMBERLAIN. No other sentence?

Mr. ANSELL. No other sentence. Though I had brought them to the attention of the department, I was not invited to participate in those matters. An officer in the department, however, handed me the original draft of the order, and I felt so strongly on the matter that I took it to Gen. Crowder and said, "It is true this is a step in the right direction, but it does not go far enough. I do not know what your authority is according to your view, but why not carry it to the point of giving it general application to all those sentences the execution of which would place a man beyond the Army, to which he could not return; specifically, sentences of death, dismissal, and of dishonorable discharge"? And, after some two or three weeks' argument, the order was finally amended, and probably published in February, so as to stay all sentences in cases not only of death but of dismissal and of dishonorable discharge, until we could study the record and advise—having no authority—the commanding general.

I think that when this committee come to consider punishments they ought to consider, in the light of service appreciation and military environment, the terribleness of the sentence of dismissal and dishonorable discharge.

Senator CHAMBERLAIN. Are you prepared to go into that with us; because we want to get it all together?

Mr. ANSELL. Yes; but when we come to talk of the bill, if we ever do, I will go into those matters. But right now——

Senator CHAMBERLAIN. Right in that connection: This advisory power which it is claimed that the Judge Advocate General had, of advising the commanding officer with respect to these sentences, how often was that advisory power exercised, and if ever exercised, what effect did it have?

Mr. ANSELL. Why, Senator, we did not review. I do not know why we should make any pretense about it. I had a responsibility in that office—notwithstanding the fact that Gen. Crowder was there. I had a responsibility—and I say to you, speaking out of that sense of responsibility, that we did not revise court-martial records. We revised officers' cases, we revised death cases, and we got little further. There was one man, not always the best man, and with all too much to do, who revised—that is, looked over—the other cases.

But I want you to understand that. I am as independent, perhaps, as a man for his own good ought to be, but do not think that you can take a human being labelled a lawyer and put him in the War Department and subject him to the power of military command and expect him to be judicially independent. He will not be. It may be that the military commander and the judge advocate do not disagree so much, because the judge advocate does the agreeing. In the same way the Judge Advocate General is not independent, but yields, meekly and modestly, to the Chief of Staff.

There is no better case of the deplorable situation into which the law department of the Army has dropped than that of the four death cases from France. See, briefly, what happened in those

cases. Judge Advocate General Crowder was dealing with the lives of four men, boys, who were volunteers, not yet 19 years of age. Two of them were tried for sleeping on post in the front line trench, and two were tried for disobedience of an order to get their equipment and go to drill. I will not go into the record of the cases minutely. There is not much record to go into, because I will say that the records in these cases comprise less than four loosely written typewritten sheets of paper—a record that condemned them to death.

Two, with a counsel whose incompetency I can scarcely find language to describe, a young lieutenant, were permitted to appear before this court and plead guilty to a capital offense. The only thing he did was to call a single witness and actually put the military character of his client in issue by asking that man, who was the company commander, this question, "What is the military record of my client here?" And the man said, "Bad; very bad. One of the worst in the country." That ended it, and that was the extent of counsel's service to that man.

The other two pleaded not guilty; but upon testimony, the brevity of which I have indicated, they were found guilty.

The two men who were found guilty of sleeping on post had been on that post, a cossack post, two men looking through the peephole out over no man's land and one resting for an hour, for the seventh day and night, until sheer exhaustion unquestionably had overtaken them. It was during the time when, with a small force, we were undertaking to hold a very large sector.

Senator LENROOT. Did that appear in the testimony?

Mr. ANSELL. That appeared. Not in the words I have used, Senator, but the facts appeared and these circumstances appeared.

Senator LENROOT. Yes.

Mr. ANSELL. The other two pleaded guilty to a disobedience of orders, and then immediately after this plea they made this statement, absolutely inconsistently with the plea. "We had been drilled so hard on these bleak hills of the Vosges in this severe climate, worked so hard and so long, that we finally reached the point of physical exhaustion, and we could no longer drill." Now, notwithstanding the truth or falsity of that statement, what was the duty of the court? The very moment that a man pleads guilty to a capital offense and then makes a statement of physical incapacity to obey an order, the duty of the court is, of course, beyond all argument, to enter a plea of not guilty and try out the case. The court did not do that. They just proceeded to railroad them through. Those men were not even arrested, the charges were not even preferred against them, in the customary way. The charge and the arrest ordinarily come immediately after the commission of the offense. The men who were alleged to have been sleeping on post were not even relieved. In fact, one of them had been found asleep, according to the report of the lieutenant and of the corporal, earlier in the evening. They did not relieve him; they kept him there, notwithstanding the evidence of his physical exhaustion. But they did not even proceed against those men in the usual military way. They waited for a month or five weeks after that, and in the meantime the military authorities had changed their policy. The records will show that in the same locality and the same command similar offenses

had been treated, and treated adequately, rather lightly. But having changed their policy, the military authorities said, "We have got to shoot somebody, and here we have got these four cases." They ran them before the court, and meantime with a court of five men in two cases and of six in the other, with the accused defended as I have indicated to you, the courts reached the conclusion of guilt, and sentenced these men to die. Then the record came, not as it ought to have come, directly to the President of the United States, who in this case was the confirming authority, fortunately, but Gen. Pershing had the records come through him. Gen. Pershing had nothing whatever to do with these cases any more than you have, or you, or I. The fact that he was commander of the Army in France does not, under the code, give him any power in these quasi judicial matters, and the channel of authority is straight from the division commander who convened that court and approved the judgment, to the President of the United States who is the confirming authority. Yet the Army commander, Gen. Pershing, interjected his authority, and put all his great power in a memorandum that accompanied those records, to induce the President of the United States to confirm these sentences of death, and even requested that he be given a mandate by cable so that the death sentences could be carried out very expeditiously.

When those records got here it seems to me that it would have been obvious to any lawyer that substantial justice was not done. Errors of law stood out upon the records. Notice, one court tried both men for sleeping on post; absolute similarity of circumstances, interwoven just like that [indicating]; one court, in the same evening, consuming 40 minutes on each case, tried one of these men after another. Who may believe that that court was a fair court in any but the first trial?

Senator CHAMBERLAIN. The same court tried all of them?

Mr. ANSELL. Yes; the same personnel, with the addition of a single man, or maybe two men, in two of the cases.

But I am addressing myself to the similarity of the cases, of all the facts and circumstances. Of course, when the court came to the trial of the second man he had already been tried. There they were, standing before the same loophole, and all that kind of thing.

Another thing, this counsel did not do his duty. The accused soldier did not have any counsel. I would have no hesitancy under those circumstances in saying that though he did have nominal counsel he did not have real counsel, the counsel that the Constitution speaks of.

It was perfectly obvious, also, that these men themselves did not act understandingly. Take the men who pleaded guilty—the two of them—they made improvident pleas. They did not know what they were up against. They were not advised.

Senator CHAMBERLAIN. Is there anything in the record to show that they were informed of the pleas?

Mr. ANSELL. Yes. You understand that this was a capital offense; but there are so many capital offenses in the manual. The slightest disobedience of orders, a lifting up of your hand against your superior officer, are capital offenses. There is a long list of capital offenses, but they do not get capital sentences for most of them, and frequently they plead guilty to a capital offense.

But these young boys, under the circumstances, knew that it was very unlikely that they would be given capital punishment. Of course, they never contemplated capital punishment, because the Army did not contemplate it at that time.

Without going into the illegalities of these trials, I will say that I wrote a memorandum and an officer for whose legal ability Gen. Crowder has a very high regard also wrote another, and said that it would be the very height of injustice to execute these men.

Let us see what happened when the records got here. When the records came to him was the Judge Advocate of the Army an independent judge in this matter? No. The first thing he did when he got these records was to write up a review of all four cases, sustaining the legality of the proceeding.

Senator CHAMBERLAIN. Did he do that himself?

Mr. ANSELL. I have no idea. I only know that he signed it and acted on it. But he left the final paragraph, the recommending paragraph, blank. Then he writes a note to the Chief of Staff, saying, "I have got the four death cases from France. They are cases in which the commanding general in France is very much interested, and is insisting upon the execution of the death penalty. I think it would be very unfortunate, indeed, if the War Department did not have one mind about these cases and agree to uphold the hands of Gen. Pershing."

And in that note Gen. Crowder asked Gen. March for a conference on the subject, that they might reach an agreement.

Here was your judge speaking, "We ought to agree to uphold the hands of the commanding general, regardless of the merits."

Senator CHAMBERLAIN. Was that aside from his review of the cases?

Mr. ANSELL. Yes; that was a note that he wrote on April 5 to Gen. March, Chief of Staff, the ultra military man, of course, and as he ought to be, and a man of no judicial appreciation. I mean his office contemplates none. I am not talking about the man, of course. The Judge Advocate General said, "We ought to agree to support the hands of Gen. Pershing in these cases," notwithstanding the fact that Gen. Pershing under the law did not have any more to do with that case than you or I. The Chief of Staff and the Judge Advocate General the next day did confer on these cases, as the Judge Advocate General had requested, and the Judge Advocate General of the Army thereupon returned to his office and filled in the blank paragraph with a recommendation, "I recommend that these men die."

When I heard about this I wrote this memorandum. I had never seen the cases before, notwithstanding the contrary testimony of some of the officers before your committee last year intent upon excusing Gen. Crowder's part in such transactions, because at the time they were given this original consideration I was in Canada; and because also, not being in favor, the cases were not sent to me. Col. Mays, who was my assistant in the office, has recently returned here and testified before the Inspector General to the effect, so he advises me, that I never could have seen those records, because the officer who reviewed them brought them to him and not to me. These cases did not come

to me. I saw them this way: A clerk in the department met me in the corridor and said, with tears in her eyes, "They are going to hang these four boys." I said: "I know nothing about it." She said: "You get the records; look it up, please, and look it up hastily." And I got the records and took them home with me and studied them. If we go directly to the end of the thing, I would say that no man would hang a dog on any such record. I went to the Judge Advocate General, and he was perturbed and irritated at my coming, and finally said to me: "If you have got anything to say about those cases, you submit it in writing." And I submitted in writing my reasons why they should not die.

And then did that memorandum get to the Secretary of War or the Chief of Staff or the President of the United States? No. He did cull such facts as he wanted out of that memorandum and put them and other things in a memorandum, No. 2, to the Chief of Staff, in which he says: "I think you ought to be acquainted with these additional facts which I have discovered subsequently to my first interview; but understand, when I submit this memorandum to you, I do it with no desire to reopen this case." And he concluded with the statement that "while these facts suggest clemency, nevertheless I do not recommend it. Gen. Pershing, of course, would feel that we had not supported him, and I sympathize with his view." Now, he has stated in this public statement that was issued broadcast throughout the country at great expense to the Government, that he filed a second memorandum, which he says, to use his rather uncandid language, "looks in the direction of clemency." In the direction of clemency!

Senator CHAMBERLAIN. May I ask you there, Can you put in the record your memorandum to him and his second memorandum to the Chief of Staff?

Mr. ANSELL. With the permission of the committee, I will put the memoranda filed by him and by me in this case into the record.

Senator CHAMBERLAIN. Yes. And then you say the Secretary of War did not see it?

Mr. ANSELL. He did not see it. It was that which seems to have set, if I might speak plainly, the department firmly against me.

Senator CHAMBERLAIN. By the way, when you put those things in the record, in order that the committee may have it before them, I would like to have his first memorandum, your memorandum, and the second memorandum of Gen. Crowder, and I would like to have you put under it that portion of this propaganda that went out from Wigmore—the language that Crowder used when he said it was looking toward clemency.

Mr. ANSELL. I should like to do that.

Senator CHAMBERLAIN. I would like to have them together, since I have had more or less controversy about that, myself.

Senator LENROOT. I suggest that he put in the record all of that record that he has in his possession.

Mr. ANSELL. These are copies that I have, of course.

Senator LENROOT. Yes, of course.

The matter above referred to is here printed in full in the record as follows:

LEDOYEN'S CASE.

Record.

GENERAL ORDERS, No. 162.

HEADQUARTERS FIRST DIVISION,
AMERICAN EXPEDITIONARY FORCES,
France, December 15, 1917.

1. A general court-martial is appointed to meet at headquarters 16th Infantry, for the trial of such persons as may be properly brought before it.

Detail for the court: Col. W. F. Creary, Infantry; Maj. Philip Remington, 16th Infantry; Capt. J. P. Bubb, 16th Infantry; 1st Lieut. B. D. Spalding, 16th Infantry; 1st Lieut. A. P. Withers, 16th Infantry; 1st Lieut. C. L. Irwin, 16th Infantry; 1st Lieut. P. L. Ransom, 16th Infantry; 1st Lieut. A. F. Kingman, 16th Infantry; 1st Lieut. W. C. Comfort, 16th Infantry. 1st Lieut. Paul C. Green, 16th Infantry, judge advocate; 2d Lieut. H. W. Clark, 16th Infantry assistant judge advocate.

The employment of a stenographic reporter is authorized.

By command of Maj. Gen. Bullard:

WM. H. CRUIKSHANK,
Adjutant General, Division Adjutant.

FRANCE, *January 3, 1918.*

The court met pursuant to the foregoing order at 8.50 o'clock p. m.

Present: Col. W. F. Creary, Infantry; Maj. Philip A. P. Withers, 16th Infantry; 1st Lieut. B. D. Spalding, 16th Infantry; 1st Lieut A. P. Withers, 16th Infantry; 1st Lieut. P. L. Ranson, 16th Infantry; 1st Lieut. W. C. Comfort, 16th Infantry; 1st Lieut. Paul C. Green, 16th Infantry. judge advocate; 2d Lieut. H. W. Clark, 16th Infantry, assistant judge advocate.

Absent: Capt. J. P. Bubb, 16th Infantry (sick); 1st Lieut. C. L. Irwin, 16th Infantry (sick); 1st Lieut. A. F. Kingman, 16th Infantry (sick).

The court proceeded to the trial of Olen Ledoyen, private, Company B, 16th Infantry, who, appearing before the court, introduced Lieut. Black, 16th Infantry, as counsel.

Pvt. Joseph A. Shea, Headquarters Company, 16th Infantry, was sworn as reporter.

The order appointing the court was read to the accused, and he was asked if he objected to being tried by any member present, to which he answered as follows: "The accused objects to Maj. Philip Remington on the ground that he is the officer who has investigated the charges and has formed an opinion."

Maj. REMINGTON. I have investigated these charges and have formed an opinion.

The COURT. If there is no objection on the part of any member present, Maj. Remington will be excused from sitting as member of the court at this trial.

There being no objection on the part of the members present, Maj. Philip Remington was excused and withdrew.

The accused was asked if he objected to being tried by any of the members remaining, to which he replied in the negative.

The members of the court, the judge advocate, and the assistant judge advocate were sworn.

The accused was then arraigned upon the following charges and specifications:

Charge I: Violation of the 64th Article of War.

Specification: In that Pvt. Olen Ledoyen, Company B, 16th Infantry, having received a lawful command from 1st Lieut. Fred M. Logan, his superior officer, to get his equipment and fall in for drill, in France, on or about the 14th day of December, 1917, did willfully disobey the same.

FRED M. LOGAN,
1st Lieut. 16th Infantry.

To which the accused pleaded:

To the specification: Guilty.

To the charge: Guilty.

The paragraphs of the Courts-Martial Manual that set out the gist of the offense were read to the court by the judge advocate.

By the president of the court: "You, Private Ledoyen, the accused, understand that in pleading guilty to the charges and specifications here you admit that you committed all the elements of the acts with which you are charged, and that you committed them of your own free will, and that you were not

forced into doing it by any influence. By pleading guilty you make it not necessary for the judge advocate to prove these charges against you, the extreme penalty for which in time of war is death, or such other punishment as the court-martial may direct. In pleading guilty you throw yourself upon the mercy of the court to adjudge you this penalty. Having been thus informed, do you wish your plea of guilty to stand?

The accused: "Yes, sir."

First Lieut. Fred M. Logan, Sixteenth Infantry, a witness for the prosecution, was sworn, and testified as follows:

Questions by the prosecution:

Q. State your name, rank, and organization.—A. Fred M. Logan, First Lieut. Sixteenth Infantry.

Q. Do you know the accused? If so, state his name, rank and organization.—A. Olen Ledoyen, private, Company B, Sixteenth Infantry.

Q. On or about the 14th day of December, 1917, did you give Private Ledoyen an order?—A. I did.

Q. He did not obey that order, did he?—A. No, sir; he did not. He refused and stated that he refused.

Q. What was the order?—A. He was ordered to get his pack and get ready for drill with his squad.

Q. Was there any reason why he would not obey?—A. No, sir. He did it willfully, and was warned at the time.

Q. Did you give him this order in person?—A. I did.

Q. Did he say anything in regard to why he disobeyed?—A. No, sir.

Q. You may state any further facts or circumstances surrounding the case.—A. At the time, when he was ordered to get his pack and report for drill with his squad, he refused, and stated that he would not go to drill. I then told him of the consequences of such an act, and gave him another opportunity to go get his pack and drill, and he again refused, saying "I refuse to go to drill."

Q. You warned him of the consequences or his acts?—A. Yes, sir.

The defense declined to cross-examine the witness.

Questions by the court:

Q. State as nearly as you can remember the exact words that you used in warning the accused of the consequences of his act.—A. I told him that he was liabling himself to trial by general court-martial, which might impose a very heavy penalty. There were four who first refused to go to drill, and two reconsidered and went to drill later. I asked the accused if he understood what he was doing, and he and Private Fishback still refused to drill.

Q. Did the accused know that a court-martial might impose a death penalty for his act?—A. I think not. I do not believe that I told him that.

Q. You stated a heavy sentence?—A. Yes, sir.

Q. Did this man offer any reason as to why he refused to drill?—A. No, sir.

Q. Was it simply a positive, flat refusal with no excuses?—A. Yes, sir.

The prosecution rests.

The defense, having no testimony to offer, made the following verbal statement: "Lieut. Logan had us out on the hill the day before and we nearly froze to death, and the next day I was so stiff I could not drill."

The court was closed and finds the accused: Of the specification, Charge I, Guilty; of Charge I, Guilty.

The court was opened and the judge advocate, in the presence of the accused and his counsel, stated that he had the record of four previous convictions which were read, and copies of which are hereto appended, marked 1, 2, 3, and 4.

Judge Advocate. "Do you, the accused, admit the correctness of these charges and convictions?"

The accused: "Yes, sir."

The court was closed, and sentences accused, Olen Ledoyen, Company B, Sixteenth Infantry, to: Two-thirds of the members present concurring therein, the court sentences the accused to be shot to death with musketry.

The court at 9.45 o'clock p. m. was opened and adjourned to meet at the call of the president.

W. F. CREARY,
Colonel, Infantry, President.

PAUL C. GREENE,
First Lieutenant, Sixteenth Infantry, Judge Advocate.

HEADQUARTERS FIRST DIVISION,
AMERICAN EXPEDITIONARY FORCES,
France, January 17, 1918.

In the foregoing case Pvt. Olen Ledoyen, Company B, Sixteenth Infantry, the sentence is approved and the record forwarded for action under the provisions of the forty-eighth article of war.

(Signed) R. L. BULLARD,
Major General, United States Army, Commanding.

(2.)

GEN. PERSHING'S INDORSEMENT.

From: The Commander in Chief.
To: The Judge Advocate General of the Army.
Subject: Trial by general court-martial, requiring action of the President.

1. I am forwarding you herewith for the action of the President four records of trial by general court-martial, in each of which cases the court has sentenced the accused to death and the sentence has been approved by the commanding general of the First Division, American Expeditionary Forces, the authority who appointed the court. In two cases the accused were convicted of willful disobedience of orders, and in the other two, of sleeping on post while sentinels in the front trenches when face to face with the enemy. Each of these cases is reviewed by Lieut. Col. Blanton Winship, Judge Advocate of the First Division. I recommend that the sentences in these cases be confirmed and that I be advised by cable of such action.

2. The fact that these men were clearly guilty of offenses punishable under the law with death is not the only, or, indeed, the principal reason for my recommendation. I believe that for purely military offenses the penalty of death should not be inflicted unless there is a military necessity therefor. It is absolutely necessary for the safety of our Army that sentinels on the outposts keep continuously on the alert, and it is just as necessary for our success as a fighting force that orders be obeyed—especially among troops in contact with the enemy. Indeed, I regard the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two who slept on post, and I believe the execution of the sentences is quite as necessary in their cases as in the others. I recommend the execution of the sentences in all these cases, in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future.

(Signed) JOHN J. PERSHING,
General, Commanding.

(3)

GEN. CROWDER'S REQUEST FOR CONFERENCE WITH CHIEF OF STAFF ON RECEIPT OF RECORDS.

APRIL 5, 1918.

MY DEAR GEN. MARCH: Here are the four cases from France involving the death sentence—two for sleeping on post and two for disobedience of orders. I regret that the reviews have been so long delayed, but I have had to go outside of the records for relevant facts.

The first paper that will encounter your attention is a brief memorandum prepared by the officer charged with the study of these cases, which will give you a survey of all four cases and will prepare you for a quick reading and understanding of the review prepared by this office in each case.

You will notice that I have not finished the review by embodying a definite recommendation.

It would be unfortunate, indeed, if the War Department did not have one mind about these cases. There is no question that the records are legally sufficient to sustain the findings and sentence. There is a very large question in my mind as to whether clemency should be extended. Undoubtedly Gen. Pershing will think, if we extend clemency, that we have not sustained him in a matter in which he has made a very explicit recommendation.

May we have a conference at an early date?

(Signed) E. H. CROWDER,
Judge Advocate General.

Maj. Gen. PEYTON C. MARCH,
Chief of Staff.

(4)

ON RETURN FROM INTERVIEW GEN. CROWDER CONCLUDED HIS REVIEW OF CASES, AS FOLLOWS:

The court was lawfully constituted. The proceedings were regular. The record discloses no errors. The findings and sentence are supported by the record and are authorized by law.

I recommend that the sentence be confirmed and carried into execution. With this in view there is herewith inclosed for your signature a letter transmitting the record to the President for his action thereon, together with an executive order designed to carry this recommendation into effect, should such action meet with your approval.

(Signed) E. H. CROWDER,
Judge Advocate General.

GEN. ANSELL'S MEMORANDUM OPPOSING CONFIRMATION OF DEATH SENTENCE.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 15, 1918.

Memorandum for Gen. Crowder.
Re Death penalty in the four cases from France.

1. After reading these records I said to you the other day that were I the confirming authority I would not confirm these sentences, and that for the same reason I could not, were I you, recommend confirmation. At your request I shall now state very briefly my reasons as I then stated them to you orally.

Ledoyen's case.—He was charged with disobeying the lawful order to fall in for drill, and was convicted upon his plea of guilty. After plea and before finding, the accused formally stated in his own behalf that he "could not go to drill" because of the extreme exposure to which he had been subjected the day before; that is, that it was physically impossible for him to drill. This statement was plainly inconsistent with his plea of guilty; accordingly, the court should have directed a plea of not guilty and tried the case on that issue. Surely in a capital case a plea of guilty, especially when, as in all these cases, the accused has not had competent counsel, should be accepted only when it was made with the utmost comprehension of all legal implications and of all consequences and only when the plea stands finally as the full, complete, and unmodified intelligent answer of the accused to the charge. Obviously the record in this case does not meet the test, and the proceedings should be disapproved.

Fishback's case.—This is in all respects a companion piece to Ledoyen's case. The military authorities have treated the two as on "all fours," and ask for the death penalty in both upon common ground. There is one difference, however. The accused in this case made no statement after his plea of guilty, and so the record does not show upon its face any statement inconsistent with the plea. Considered independently, then, the record gives no basis for the destructive opposition made to Ledoyen's case. The human facts do. The facts of the two cases are the same; the conditions and circumstances of the conduct denounced in both cases are the same. This is shown by the record and conceded and acted upon by the military authorities. Disapproval need not be based upon strict legalism. Other considerations are admissible. In view of what I have said, and following the facts of record in Ledoyen's case, I could not confirm the Fishback case.

Sebastian's and Cook's case.—The death penalty in each of these cases was awarded for sleeping on post after an inadequate defense. In capital cases extenuating circumstances are matters of defense. The defense in these cases set up, formally and without force or persuasion, however, the fact that the accused had been in the front-line trench for five previous nights from 4.45 in the evening until 6 o'clock in the morning, with an actual stand in the sentry post of two hours on and one hour off. Of course, little rest and no sleep could be had in such a brief respite. Night after night of vigilance, without opportunity for sleep, must rapidly bring exhaustion unless there be chance for rest and sleep during the day. The accused in one case testified that sleep was impossible in the dugout during the day because of the chopping of wood therein. In the other case the accused testified that little or no sleep could be had because of noise, without speaking more specifically. These are matters of ex-

tenuation, the truth of which the court made no effort to prove or disprove. A competent statement made in defense and standing unimpeached ought to be taken as true. Furthermore, in one of the cases the evidence of exhaustion is rather convincing. The accused was found evidently asleep in the early evening, around 8 o'clock. He should have been relieved then by the corporal who observed his condition. He was not relieved until discovered asleep the second time in the early morning hours.

Generally.—These cases were not well tried. The composition of the court in Ledoyen's case consisted of one colonel, one major, and four first lieutenants. The four first lieutenants could have had but little experience. I can not help recall the British rule which requires, I think, in such cases three years' service to render an officer competent as a member of a court-martial. The same court that tried Ledoyen tried Fishback. The court that tried Cook was composed of the same members, except a captain (doubtless of considerable experience) and a first lieutenant (practically of none) were present. And the same court that tried Cook tried Sebastian.

The character of the record, with its brevity, is such as to leave the human understanding disturbed by the formal conviction that it carries. These were mere youth. Not one made the slightest fight for his life. Each was "defended" by a second lieutenant. Such defense as each had was not worthy the name. Were I charged with the defense of such a boy on trial for his life, I would not, while charged with that duty, permit him to make a plea that means the forfeit of his life. The Government should be made to maintain its case at every point in the trial of a capital crime. Court, judge advocate, and counsel should all endeavor to see that there is a full trial as well as a fair trial, and that no matter of defense, including extenuation, be omitted.

There is another matter that, finding lodgment in my conscience, I shall express: There is an insistence upon the part of Gen. Pershing which tends to prejudice these cases. He seems to have forgot that he is not the reviewing authority. The relation between confirming authority and the President in these cases is judicial. I do not say that Gen. Pershing may not make general recommendations as to the maintenance of discipline in his command. I know he may. But his recommendation in these cases is a special thing, specially interposed in the course of justice, and characterized by great insistence. He asks that he be advised by cable of the act of confirmation, and makes a powerful argument, the gist of which, after all, is to be found in his view of the necessity of exemplary punishment in these cases. It may be the punishment made especially drastic for the purpose of example at times has its place and value; but exemplary punishment is dangerous to justice. The execution of all military offenders would very likely decrease the number of future offenses and offenders. But such Draconian methods would destroy justice without which all else in human society is of no worth.

It is only right for me to say to you that the military mind will, in my opinion, almost unanimously approve of confirmation in these cases. I do not say that the military view is to be ignored by the Commander in Chief of the Army. I myself would not ignore it. But when it offends against my well-considered sense of law and justice I can not follow it.

S. T. ANSELL,
Brigadier General.

(6)

COPY OF COL. ALFRED E. CLARK'S MEMORANDUM GIVING REASONS WHY DEATH SENTENCES SHOULD NOT BE EXECUTED.

APRIL 10, 1918.

Memorandum for Gen. Crowder.
Subject: Four cases from France involving the death sentence.

1. In addition to what appears in the several reviews of these four cases, the following additional facts are called to your attention as bearing upon the justice and expediency of carrying the sentences into effect:

(*a*) All these cases arose in the 16th Infantry. Two of the accused were not brought to trial for 50 days and upward after their alleged offenses. All of the cases were tried with an expedition which does not give on the face of the records any appearance of deliberation. In each case the defense of the accused was so indifferent as to be practically no defense.

(b) Upon the trial of two of the cases but five officers sat—one colonel and four first lieutenants. These two trials lasted from 8 p. m. until 9.45 p. m.;

that is, from the beginning of the first trial until the conclusion of the second trial there elapsed 1 hour and 45 minutes. Counsel for the accused made no statement or argument in either of these cases.

In the other two cases eight members of the court sat. The first of these two trials began at 1.20 p. m. and the second was completed at 5.25 p. m. In the first of these cases counsel for the accused made an argument of six lines, and the second an argument of eight lines.

(*c*) Two of the soldiers—Fishback and Ledoyen—were tried for willful disobedience of an order to go out and drill. It does not appear that their organization was near or in contact with the enemy. Both of these men were tried the same evening between 8 and 9.45 p. m.—two trials. Fishback was first tried; and it appears in the record of that case that both of the soldiers were together when the order was given. The lieutenant who claims to have given the order testified:

"Q. Did he (Fishback) make any reply to the order?

"A. Either he or Ledoyen made the reply that they refused to go to drill."

The answer leaves it in doubt as to which refused. Clearly there was but one order given, apparently directed to both. Clearly, also, when the court passed upon the Fishback case it necessarily had in practical effect decided the Ledoyen case, which immediately followed. Notwithstanding this, counsel for the accused made no challenge.

It is alleged that the disobedience occurred on November 14. The charge sheet shows that each of these men was placed in confinement on November 13. There is evidence in the record that these men were both in arrest or under guard when the order was given. Why they were in arrest and by whom placed in arrest, and whether or not they were to be released from arrest to go out to drill in obedience to the order does not appear.

(*d*) With respect to the two men convicted of sleeping on post, one—Pvt. Sebastian—is alleged to have committed the offense on the night of November 3–4; Pvt. Cook, on the following night. Cook was put in arrest November 13 and Sebastian November 14.

The length of time which elapsed after the alleged offenses and before the men were brought to trial, the expeditious and seemingly formal manner in which they were tried, the lack of any apparent effort on the part of the counsel for the accused to make a real defense, the circumstances of extenuation shown in the reviews—especially in the cases of the two men convicted of sleeping on post—altogether, and coupled with the disposition made by the same court of other cases of like nature arising in the same organization about the same time, make up a record on which it will be difficult to defend or justify the execution of death sentences by way of punishment, or upon any ground other than that as a matter of pure military expediency some one should be executed for the moral effect such action may have upon the other soldiers.

(*e*) The four convicted men entered the Army by voluntary enlistment—Ledoyen on February 3, 1917; age on enlistment papers, 18 years and 1 month. Sebastian, April 18. 1917; age, 19 years and 6 months. Fishback, February 17. 1917; age, 19 years and 2 months. Cook, May 11, 1917; age 18 years and 11 months. None had any previous military experience.

(*f*) Reference has already been made to other cases tried by the same court. These will now be more particularly referred to.

William Hindman, private, Company G, 16th Infantry. This soldier was accused of sleeping on post in the front trenches on the night of November 5–6. This is the same night that Pvt. Cook, who was convicted, is alleged to have committed a like offense. In the Hindman case Corpl. Walenic and Pvt. Clark were witnesses for the prosecution, as they were also in the Cook case. In each case it was said that Pvt. Clark was on duty when his comrades were found asleep. The story told by Corpl. Walenic concerning Pvt. Hindman is in essential respects very much like the story he told concerning Pvt. Cook. If anything, the evidence was stronger against Pvt. Cook, because Corpl. Walenic testified that the former was sitting down with his blanket around his head and, as he believed, asleep when discovered by the corporal. In the case of Pvt. Cook, who was convicted, the evidence clearly shows that he was standing on the firing step in a natural position, with his rifle resting on the parapet at the time of the alleged offense. Cook was convicted upon the testimony of the two witnesses referred to, and Hindman was acquitted in spite of the evidence of these same witnesses by the same court.

Adam Klein, private, Company G, 16th Infantry, was accused of sleeping on post November 3, 1917. This is the same night that it is alleged Pvt. Sebastian was found asleep. It will be noted that all these men belong to the same organization. Lieut. D. S. McCune testified directly that he found Klein asleep. He was on duty in the front-line trench. Klein was acquitted.

Dewey G. Brady, Company G, 16th Infantry, was accused of sleeping on post on the night of November 5. This is the same night that it is alleged Pvt. Cook was found asleep. Again Corpl. Walenic was the chief witness for the prosecution. His story of how he came upon Brady, found him asleep, took his rifle, etc., is in essential respects a replica of the story he told in the Cook case, and the evidence in support of the charge against Brady is quite as strong, if not more convincing, than that in either the Cook or the Sebastian cases, in which the men were convicted. Brady was tried by the same court and acquitted.

Pvt. Herbert Tobias, Company E, 18th Infantry, was accused of sleeping on post in the front trenches on November 9. He was tried by a different court, appointed, however, by the same reviewing authority, viz, Maj. Gen. Bullard. The evidence was direct and positive that he was found sound asleep on his post. The accused did not take the stand and make any denial of the charge. He was tried December 15, was found guilty, and sentenced to be dishonorably discharged, with the usual forfeitures, and to be confined for three years. The reviewing authority returned the record for some clerical corrections, and with the suggestion that the court reconsider the case with the view to imposing a heavier penalty. Upon reconsideration the court increased the period of confinement to 10 years, and this sentence was approved.

(*g*) A number of cases have come from other organizations in France where men were convicted of sleeping on post or willful disobedience of orders. The following are some of the sentences:

Pvt. John L. Shade, United States Marines, convicted of sleeping on post November 19, 1917. The sentence as approved was six months' confinement and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy, reviewing authority.

Pvt. Aubrey La Lace, convicted of sleeping on post January 14, 1918. The approved sentence was confinement for one year and one month, with total forfeiture during that period. Maj. Gen. Kernan, reviewing authority.

Pvt. William F. Glidia, convicted of sleeping on post October 31, 1917. The approved sentence was confinement for six months and forfeiture of two-thirds of his pay for a like period. Gen. Coe reviewing authority.

Pvt. Enio J. Halonen, United States marines, was convicted of sleeping on post December 7, 1917. The sentence as approved was confinement for three months and forfeiture of two-thirds off his pay for a like period. Maj. Gen. Bundy was the reviewing authority.

Pvt. Edward M. Wood was convicted of leaving his post before being regularly relieved on November 14. The sentence as approved provided for confinement for six months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Kernan reviewing authority.

Pvt. James Hadestron was convicted of leaving his post before being regularly relieved on December 29. The sentence as approved was confinement for six months with forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy reviewing authority.

The records show with respect to some of these cases that the offenses were not committed in the front-line trenches. As to others, the records do not show where the offenses were committed.

A number of cases have also come in from France where men were convicted of willful disobedience of orders under circumstances which do not distinguish them as to the locus of the offense from the cases of Fishback and Ledoyen, sentenced to death. The sentences run from a few months to several years.

ALFRED E. CLARK,
Lieutenant Colonel, Judge Advocate.

GEN. CROWDER'S FINAL MEMORANDUM.

APRIL 16, 1918.

Memorandum for Gen. March.
Subject: Four cases from France involving the dealth penalty.

1. Since our interview on the four cases from France involving the death sentence, at which interview we agreed that we would submit the cases with

a recommendation that the sentences be carried into execution, my attention has been invited to certain facts of which I had no knowledge at the time of the interview and to which I think your attention should have been invited.

The following four cases of sleeping on post, three of which appear to have arisen in the same regiment, namely, the 16th Infantry, on approximately the same date, and one in the 18th Infantry four days later, were disposed of as follows:

(*a*) William Hindman, private, Company G, 16th Infantry. This soldier was accused of sleeping on post in the front trenches on the night of November 5–6. This is the same night that Pvt. Cook, who was convicted, is alleged to have committed a like offense. In the Hindman case Corpl. Walenic and Pvt. Clark were witnesses for the prosecution, as they were also in the Cook case. In each case it was said that Pvt. Clark was on duty when his comrades were found asleep. The story told by Corpl. Walenic concerning Pvt. Hindman is in essential respects very much like the story he told concerning Pvt. Cook. If anything, the evidence was stronger against Pvt. Hindman than against Pvt. Cook, because Corpl. Walenic testified that the former was sitting down with his blanket around his head, and as he believed, asleep, when discovered by the corporal. In the case of Pvt. Cook, who was convicted, the evidence clearly shows that he was standing on the firing step in a natural position, with his rifle resting on the parapet at the time of the alleged offense. Cook was convicted upon the testimony of the two witnesses referred to, and Hindman was acquited in spite of the evidence of these same witnesses, by the same court.

(*b*) Adam Klein, private, Company G, 16th Infantry, was accused of sleeping on post November 3, 1917. This is the same night that it is alleged Pvt. Sebastian was found asleep. Lieut. D. C. McCune testified directly that he found Klein asleep. He was on duty in the front-line trench. Klein was acquitted.

(*c*) *Dewey C. Brady*, Company G, 16th Infantry, was accused of sleeping on post on the night of November 5. This is the same night that it is alleged Pvt. Cook was found asleep. Again Corpl. Walenic was the chief witness for the prosecution. His story of how he came upon Brady, found him asleep, took his rifle, etc., is in essential respects a replica of the story he told in the Cook case, and the evidence in support of the charge against Brady is quite as strong, if not more convincing, than in either the Cook or the Sebastian cases, in which the men were convicted. Brady was tried by the same court and acquitted.

(*d*) Herbert Tobias, private, Company E, 18th Infantry, was accused of sleeping on post in the front trenches on November 9. He was tried by a different court, appointed, however, by the same reviewing authority, viz, Maj. Gen. Bullard. The evidence was direct and positive that he was found sound asleep on his post. The accused did not take the stand and make any denial of the charge. He was tried December 15, was found guilty, and sentenced to be dishonorably discharged, with the usual forfeitures, and to be confined for three years. The reviewing authority returned the record for some clerical corrections, and with the suggestion that the court reconsider the case with a view to imposing a heavier penalty. Upon reconsideration, the court increased the period of confinement to ten years, and this sentence was approved.

2. I think, perhaps, you would also like to know something of the state of discipline in other organizations in France as evidenced by the fact that in the following cases men have been convicted of sleeping on post, or of leaving post before being regularly relieved, with sentences adjudged which are, by comparison with the death sentence, almost trivial:

(1) Pvt. John L. Shade, United States Marines, convicted of sleeping on post November 19, 1917. The sentence as approved was six months' confinement and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy, reviewing authority.

(2) Pvt. Aubrey Le Lace, convicted of sleeping on post January 14, 1918. The approved sentence was confinement for one year and one month, with total forfeiture during that period. Maj. Gen. Kernan, reviewing authority.

(3) Pvt. William F. Glidia, convicted of sleeping on post October 31, 1917. The approved sentence was confinement for six months and forfeiture of two-thirds of his pay for a like period. Gen. Coe, reviewing authority.

(4) Pvt. Enio J. Halonen, United States Marines, was convicted of sleeping on post December 7, 1917. The sentence as approved was confinement for three months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy was the reviewing authority.

(5) Pvt. Edward M. Wood was convicted of leaving his post before being regularly relieved on November 14, 1917. The sentence as approved provided for confinement for six months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Kernan, reviewing authority.

(6) Pvt. James Hadestron was convicted of leaving his post before being regularly relieved on December 29. The sentence as approved was confinement for six months, with forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy, reviewing authority.

The records show with respect to some of the six cases listed above that the offenses were not committed in the front-line trenches. As to others the records do not show where the offenses were committed.

3. In addition to the foregoing the study in this office reveals a number of cases which have come in from France where men have been convicted of willful disobedience of orders under circumstances which do not distinguish them as to the locus of the offense from the cases of Fishback and Ledoyen, who were sentenced to death. The sentences in the cases referred to run from a few months to several years' confinement.

4. Permit me finally to observe, without reopening the case, that it will always be a matter of regret to me that the four cases upon which we are called upon to act were not well tried. The composition of the court in Ledoyen's case consisted of one colonel, one major, and four first lieutenants. The four first lieutenants could have had but little experience. The same court that tried Ledoyen tried Fishback. The court that tried Cook was composed of the same members, except a captain (doubtless of considerable experience) and a first lientenant (presumably of little experience); and the same court that tried Cook tried Sebastian.

We have discussed the fact that each of the four defendants was a mere youth, and I am a little impressed by the fact that not one of them made any fight for his life. Each of the four men was defended by a second lieutenant, who made no special plea for them. I regret exceedingly that in each case the accused was allowed to make a plea of guilty. As counsel for them I should have strongly advised that they plead not guilty and require the Government to maintain its case at every point.

It will not have escaped your notice that Gen. Pershing has no office of review in these cases. He seems to have required that these cases be sent to him for the purpose of putting on the record an expression of his view that all four men should be placed before a firing squad. I do not make this statement for the purpose of criticizing his action. Indeed, I sympathize with it. But it is fair, in the consideration of the action to be taken here, to bear in mind the fact that Gen. Pershing was not functioning as a reviewing officer with any official relation to the prosecution, but as commanding general anxious to maintain the discipline of his command.

E. H. CROWDER,
Judge Advocate General.

Mr. ANSELL. As I say, that memorandum did not get anywhere. Two of these cases are the cases that we saw featured in the Washington Post here on Friday or Saturday morning, where there was printed a letter written by Mr. Baker to the President, saying, in effect, "My dear Mr. President: You recall the cases of Sebastian and Cook, who were tried and found guilty last year, in France, of sleeping on post, and whom you so graciously pardoned. I wish to advise you what the happy effect of that clemency was in those two cases. They were restored to the colors, and one of them has been killed in the battle in the Argonne, and the other has been honorably discharged."

Senator CHAMBERLAIN. Twice wounded.

Mr. ANSELL. Yes; twice wounded and then discharged.

The other two cases, however, gentlemen, he did not mention, and those other cases were commuted, fortunately, by the President later to three years in the penitentiary.

And I say that these were cases where the President did not have to resort to pardon, because the President, being the confirming

authority in these cases, had the power that a commanding general below has, to set the proceedings all aside. They pardoned two of them and sent two to the penitentiary. The man who died in the Argonne, though pardoned, died with the judgment of guilt, of having slept on his post in the face of the enemy, branded upon him. As a matter of law, he was not guilty at all. The same thing is true of the man so seriously wounded.

And the men who have served in the penitentiary from that time to this are, in my judgment, serving absolutely unlawful sentences; and I so said in the memorandum that I wrote in that case before going to France, which never reached the Secretary of War. Before leaving for France, finding that it had not been forwarded, I did send that memorandum to a distinguished Member of Congress and ask him to take the matter up with the President of the United States.

Senator LENROOT. And clemency was eventually granted?

Mr. ANSELL. Clemency granted in all cases.

Senator CHAMBERLAIN. In all four cases?

Mr. ANSELL. Yes.

Senator LENROOT. I mean in all four cases.

Mr. ANSELL. Yes; two of the men were pardoned outright, notwithstanding the fact, Mr. Chairman, that the division commander said they should die, notwithstanding the fact that Gen. Pershing clamored that they should die, notwithstanding the fact that the Judge Advocate General agreed that they should die, and notwithstanding the fact that the Chief of Staff said they should die, and the entire military hierarchy clamored that they should die. But fortunately, in this case the civil view of justice did prevail to the point where though they did not set aside the sentence as they ought to have done, because that course was not called to the attention of the Secretary of War, the men did not die.

Senator CHAMBERLAIN. That was in your memorandum?

Mr. ANSELL. In my memorandum. He did not set them aside; strike down the judgments as they ought to have been struck down.

Senator CHAMBERLAIN. The Secretary of War did not approve these judgments, did he?

Mr. ANSELL. Yes; he approved of the judgments and reduced them.

Senator CHAMBERLAIN. He did not disapprove?

Mr. ANSELL. No, indeed; he did not disapprove them. He and the President approved of the sentences but granted some clemency.

Senator CHAMBERLAIN. Let me be sure about that. The Secretary of War, you say, did not see your memorandum?

Mr. ANSELL. No.

Senator CHAMBERLAIN. Do you know whether or not he approved of the final judgment of Gen. Crowder and Gen. Marsh?

Mr. ANSELL. No; I think not, entirely. I think the Secretary of War recommended clemency.

Senator CHAMBERLAIN. Do you think so?

Mr. ANSELL. Yes.

Senator LENROOT. Was that before or after the intervention of these memoranda you speak of?

Mr. ANSELL. I have not the slightest idea. You see, I went to Europe, and I only know that I got a personal letter from a reliable

source over here saying that the men would not be hanged. I did not know what happened. Whether the President ever conferred with the Member of Congress I do not know. I think so.

Senator LENROOT. That is what I wanted to know.

Senator CHAMBERLAIN. I think the President very properly addressed the Secretary of War a letter the other day commending the gallantry of these young fellows; and may I ask to have those two letters inserted in the record? They are printed in the press and we can not vouch for their authenticity, but I assume they are correct:

(The newspaper clipping referred to is here printed in full as follows:)

SAVED BY PRESIDENT, BOYS PROVE HEROES; SLEPT AT POSTS; PARDONED; ONE IS KILLED IN WAR, SECOND WOUNDED.

An exchange of letters between President Wilson and Secretary of War Baker yesterday revealed the redemption of two boy soldiers sentenced to die after a court-martial in France for sleeping on outpost duty, but later pardoned by the President. The letters, which tell the story, are as follows:

"MY DEAR MR. PRESIDENT: You will recall that early in 1918 four death sentences were presented to you from France. Two, for disobedience of orders, you remitted to terms of imprisonment, and two young boys, Sebastian and Cook, who were convicted of sleeping on outpost duty, you fully pardoned.

"It will interest you to know that upon restoration to duty both made good soldiers. Sebasian died in battle in the Aisne offensive in July, 1918. Cook was wounded in the same battle and restored to health in time to fight in the Meuse-Argonne battle, when he again fought gallantly and was the second time wounded. He has now been restored to health through medical attention and has been honorably discharged from the service.

"Respectfully, yours,

"NEWTON D. BAKER."

Here is the President's reply:

"MY DEAR BAKER: Thank you for your thoughtfulness in telling me about the records made by Sebastian and Cook, the two youngsters who were pardoned for sleeping on outpost duty. It is very delightful to know that they redeemed themselves so thoroughly, and it was very thoughtful of you to give me the pleasure of learning about it.

"Cordially and faithfully, yours,

"WOODROW WILSON."

Mr. ANSELL. The point I make in those cases is that it is bad enough that men have got to serve a term in the penitentiary when, as I say, lawyers and judges would have said that the conviction was illegal; but the point I make is that the whole military hierarchy, capped by your Chief of Staff and the Judge Advocate General of the Army, who is not independent of the Chief of Staff, clamored and entered into an agreement that these men should die.

Senator CHAMBERLAIN. By the way, General, right in that connection, even the act of extending clemency on the part of the President does not remove the stigma of conviction.

Mr. ANSELL. Certainly not.

Senator CHAMBERLAIN. In other words, the judgment still stands?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. So that the young man who was killed, and the men who were discharged, still have that stigma against them.

Mr. ANSELL. Yes. But the great point in these cases is, I called them up not only to illustrate how narrowly these men escaped death, but to illustrate the dependence under existing law of your

Judge Advocate General upon the power of military command, and the evils of it. The Judge Advocate General is absolutely dependent on the power of military command, in his case the Chief of Staff. How much more true is that of the subordinate judge advocate upon the staff of the commanding general?.

Senator LENROOT. I am not speaking about the offenses punishable by death; but do you draw a distinction between the revision of a court-martial in time of war in the face of the enemy where it does appear that substantial justice has been done, but technical error has been committed—a distinction between revising that kind of a court-martial, and one where there could be injury following a mere technical following of the law?

Mr. ANSELL. You know, Mr. Chairman, I am rather glad that you asked me this question, because I have rather set views along this line, and I believe they are views that will be approved by all legally trained men; indeed, I believe by men of practical common sense.

You are drawing the distinction between a case in which you say from looking over the record that substantial justice has been done notwithstanding technical error, and the case where there is technical error and not substantial justice done.

The moment you admit such a distinction as that you are lost. If you hold that there is in the proceedings error of the kind that lawyers call prejudicial, and nevertheless permit your judgment to be overruled by the general conception that the result is a just one, you have tried that man not according to law; you have tried him according to your own personal judgment of whether the man is guilty or not. In other words, I think if a member of this committee or if any lawyer, or for that matter any other man, admits that "it is true this man was not legally tried; it is true there are technical errors which, in and of themselves, are sufficient to work a reversal of the judgment in the case, nevertheless I, because of a personal view that I have of that record and that trial, and a knowledge of the attending circumstances, believe that substantial justice will be done by affirming that judgment," you have drawn a destructive distinction between legal guilt and moral guilt. That must not be done. That is the distinction that the mob draws.

Senator LENROOT. But, General, is not the trend of the civil law—of the civil courts—more and more to disregard technical error and look to the substance?

Mr. ANSELL. Yes; certainly, Mr. Chairman.

Senator LENROOT. Yes.

Mr. ANSELL. But that involves only the question, Is error prejudicial to the judgment?

Senator LENROOT. Yes; certainly.

Mr. ANSELL. And do not let us say according to the law of the land and the precedents and authorities—the enlightened authority—that this judgment is bad, and yet insist upon its execution. Do not let us compromise with that. If we once determine that the judgment is prejudiced by error, let us have a new trial. This very question, Mr. Chairman, is one of vital interest.

Senator LENROOT. Let me see, General: Then it is your view in all cases that, although error might have been committed, unless the

revising authority finds that the error is really prejudicial it would not be ground for reversal of judgment?

Mr. ANSELL. Certainly not, sir. Nobody could deprecate more than I some of the civil decisions that I think have been not in line with sensible authorities. Some appellate decisions have shown a meticulousness that I think judges and lawyers disapprove of. I remember one court actually held that the indictment was bad because in the concluding sentence it did not contain the definite article before the word "state," and therefore the court said they could not tell what law was violated. Utterly absurd!

But when we come to the substantial things, the denial of a man's substantial rights, though I know that as human beings we frequently say from our knowledge of the record, from our knowledge of the situation and the circumstances, from what we imply from that record, that we believe that that fellow is as guilty as Cain, yet is not that the time, right then, for the law to interpose and govern our judgment? In 1849 a distinguished and eminent London barrister had cause, after he had been counsel for a Capt. Douglass of the English army, to attack the English court-martial system, as the result of which it was much improved. He fought the case through the military hierarchy, terminating, if I remember, at that time in Lord Wellington himself—it may not have been so, but I think it was—in any event, a distinguished general and statesman, through the Judge Advocate General, upon a question of competency of evidence. They said "The evidence was incompetent, but still we know the fellow is guilty." He got nowhere. Then suddenly he wrote an open letter to the Queen and published it, and I am sure that any member of this committtee, if he is interested in the beauties of legal expression that we frequently find in such productions, will find it well worth his while to read this letter. It would be well worth the while of any member of the committee interested in our present establishment and its history. He ran up against this very thing. The Judge Advocate General of England said "Why, you know, Mr. Warren, that this fellow is guilty. The whole Army knows he is guilty. It is a matter of common knowledge that he is guilty." It happened that that was one of those cases in which time proved that the man was not guilty; but the War Department and the Army insisted that he was guilty, and this lawyer went, single-handed, to the country upon it.

He ran across this very argument, you see, and I want to quote to you a striking paragraph from this letter. It is worth quoting. It might well be put in our military books, that our younger men should study and reflect upon it. I am quoting from an address that I made, and I put the statement of this British barrister in antithesis to some statement made by some of our judge advocates when they were testifying before the committee of the American Bar Association in this city; and I say as a lawyer I have sympathy, not contempt, for a lawyer who finds himself so imposed upon by military authority, that he has got to testify as these men testified. Listen to what these men testified to. [Reading:]

While in many cases the trials of enlisted men are not so elaborate as the trials of officers, and in many cases the rules of evidence are not observed, and counsel is obviously inadequate, and while in a considerable percentage of the cases we find the decision is not sustained by the fact, still I do not

recall a single case in which, morally, we were not convinced that the accused was guilty. (Testimony of a reviewing judge advocate before committee American Bar Association, Mar. 27–28, 1919, notes, vol. 1; concurred in by the others.)

I say I place in antithesis to this the only rule that lawyers can respect, the only rule that can protect a man's rights on trial, the only rule that a government can afford to adhere to, if you are going to have a government by law and not by the judgment of a mere personal being.

I quote from Warren. [Reading:]

> It concerns the safety of all citizens alike that legal guilt should be made the sole condition for legal punishment; for legal guilt, rightly understood, is nothing but moral guilt ascertained according to those rules of trial which experience and reflection have combined to suggest for the security of the State at large. * * * They (these fundamental principles of our law) have, nevertheless, been lost sight of, and with a disastrous effect, by the military authorities conducting and supporting the validity of the proceedings about to be brought before Your Majesty. (Warren's letter to the Queen, p. 9.)

That made a profound impression on me, because it is a conclusive answer to this sort of rough-and-ready standard that people are inclined to adopt for the determination of the guilt of others, but never of themselves. If you want to find the sharpest critic in the world of the American system of military justice, show me an officer who has once been haled before a court-martial.

Senator LENROOT. By my question to you, General, with reference to substantial justice being done, I of course did not mean to infer that it should be made to appear de hors the record.

Mr. ANSELL. I did not suppose so.

Senator LENROOT. But could there not be such a thing as saying that there had been substantial justice done according to the record, and at the same time there was substantial error?

Mr. ANSELL. I should think not. If they could say, as lawyers, "This is not substantial error," I am willing to abide by that. But do not let them say "This is substantial error but nevertheless we are going to disregard it, because substantial justice has been done."

That brings us to another thing. If you are going to revise the Articles of War, we must not lose sight of the present attitude of the Army on these questions. We run against it all the time. Take the question of evidence; there is no man in all the world with less legal appreciation than a Regular Army officer; none. I make that statement. He is trained away from legal appreciations; and if you just talk law or legal principles or lawyers, you excite his prejudices right away. But it is not only the American Regular Army officer; he is nothing in the world but a successor of the old British officer, and I think Gen. Napier was as fine an example of a fine British Army officer as you will ever find, though thoroughly and absolutely destitute of every legal appreciation. The British, however, have gone far ahead of us in remodeling this system that we took over from them; but it has not been done with the consent of the regular army, but against them. They have been obdurate in the matter. It has been done by the lawyers of the land.

Gen. Napier undertook to take the lawyers to task for interference with military discipline—that is their great standby, discipline—and he made an attack upon the attitude of the English bar, and you will find that attack published in Napier's Notes on Military

Law; and there was not a shrewder soldier in all England than he. He just simply had a wrong mental poise toward legal proceedings. Napier got after the lawyers about undertaking to apply in the trial of courts-martial the rules of evidence as they were understood in the civil courts.

Senator CHAMBERLAIN. Is this Warren, now?

Mr. ANSELL. Yes; this is Warren again, answering Napier. There are others who have said the same thing as Napier, but his is a handy book. I want to read this to you, because, in my twenty-odd years of experience if I had not heard the same expression put this way a thousand times by our regular officers, I never heard it in my life. And I have heard it from the highest authorities; from chiefs of staff, particularly. Listen to what this distinguished British general said, to whom England owed so much. She could not follow him here. He could not stand cross-examination when he says:

> And why should not a soldier commit himself? The business of courts-martial is not to discuss law, but to get at the truth by all the means in its power. We soldiers want to get at the fact, no matter how, for the sake of discipline, and I know of no better evidence against a man than himself. (Napier's Notes, Military Law, accepted and frequently quoted by officers of the United States Army.)

He was quarreling with the British bar, because the British bar had undertaken to intercede for the men who are subjected to this military third-degree method which is prevalent in our service at this very day. "We want to get at the fact, the truth;" as though army men had some empirical standard for getting at the truth which worked invariably, but that standard was not according to the law—something else than that they had! I say that I have heard that statement quoted a thousand times in the War Department: "We do not want lawyers; we do not want law; we do not want rules of evidence. We just want the plain unvarnished fact." If there is a set of men on God's earth more incompetent by virtue of their authority and environment to get at the truth other than by the rules of evidence, than the officers of the Army, I do not know where they are to be found.

I want to take the time to read Warren's classic answer. He said:

> Our rules of evidence are the safeguards of every subject of your Majesty, high and low, rich and poor, young and old. Were those rules to be disregarded, anybody might at any time be found guilty of anything. They ought, of all others, to be kept inviolate, for the whole administration of justice depends upon them. They are, as I have this day seen observed in full force and eloquence, the result of the collective wisdom of generations and founded on the principles of immutable equity. (Warren's letter to the Queen on a late court-martial, p. 8, which was instrumental in revolutionizing the British military code.)

Yet your very committee, when you came to revise these articles in 1916, instead of writing into these articles that courts-martial would have to observe the rules of evidence as they are observed by our Federal courts, namely, the rules of common law as they have been changed by statutes of Congress, did what? It had been the understanding, the custom, that courts-martial would, when convenient, follow well-understood rules of evidence; which of course they did not understand, but nevertheless we had that generally accepted

standard resting upon custom and practice, and at the behest of the Judge Advocate General you struck down this rule.

Senator CHAMBERLAIN. May I say in reference to that revision of 1916, I was chairman of the committee during the hearings on that, and there were no hardships being alleged against the military system then; there was no insistence that they should be amended; there were no cases of hardship brought to the attention of the committee; and I think you will remember that the only purpose of the amendment was to give them effect in the Philippines and in our insular possessions, and possibly there were a few other changes that were insisted upon, but nobody made any objection.

Mr. ANSELL. I am not criticizing that, Senator.

Senator CHAMBERLAIN. I just wanted you to know the fact about it.

Mr. ANSELL. I do not think there was the interest in the matter that there is now. The committee did not know. These things had not been called to your attention. But nevertheless I want to show you what a committee is up against when you come to take your advice from the War Department, exclusively.

Senator CHAMBERLAIN. If I had known then what I know now—if the committee had known then what they know now—they would have been very likely to make changes.

Mr. ANSELL. Yes. One of the changes—and there were only three important changes, and I use the word "substantial" and "important"—in this revision was this. Listen. [Reading:]

> The President may prescribe the procedure, including modes of proof, in cases before courts-martial. (Articles of war enacted in 1916 upon the recommendation of the Judge Advocate General of the War Department.)

And that of course abolished the rule that then existed requiring courts-martial to recognize the rules of evidence applied in criminal courts of the United States.

But let us see the argument that was made for this revision, because it is indicative of a state of mind that I think we ought to know about.

First, you will observe that it is right in line with the old idea that the commander in chief is everything. He is the supreme court. That is what is said. They likened the commander in chief to the Supreme Court, and then they said "We will liken the administration of military justice to equity and admirality matters, because in those matters under existing statute the Supreme Court of the United States can make these rules of procedure, including modes of proof."

The truth of the matter is that we do not regard the enlisted men of the Army as really human beings, persons, who can suffer, and who when properly appealed to can respond, can actually move mountains through that appeal but rather as property. We actually went to the statutes of the United States on the civil side of things and took those statutes that intrusted to the Supreme Court of the United States the making of rules of evidence in matters that can concern only property—equity and admiralty especially—and said that we thought it would be a wonderfully good thing if we invested the President of the United States with like power over soldiers. Now, in this little manual you will find how to prove murder and how to prove rape and arson; how to get at the gist of the thing.

And there are rules of evidence. But you have put it in the hands of the President to prescribe these rules of evidence, and the effect is this, that he has not prescribed them. Of course not! I think it would be very difficult for a man to prescribe thus briefly rules of evidence; there is so much left that goes beyond the mere expression. But still, he has not prescribed them; and under this power if he prescribed them to-day, he can change them to-morrow; and when he does not prescribe, the courts feel at liberty to follow any rule they please, very properly; and since that time—I speak out of my experience for the War Department both before and after the making of this statute—since that time we have less respect for the rules of evidence than we ever had before, because what is found in the manual rises to no greater dignity than what else is found in the manual, how many sheets of paper to use and how to fold them and how to number them, which can be violated with impunity; and of course where nothing is prescribed, there is license to the court to do as it pleases.

Going back to the efforts made during the war, I have shown that the reactionary and absolutist view prevailed, and the Judge Advocate General was reduced to making "studies" and memoranda of advice upon pure questions of law for the benefit of commanding generals, if they chose to accept or profit by them.

It was up to me to accept the situation, and I endeavored, for the office of the Judge Advocate General, to perform the duty as best I could. It was up to us so to organize the office that we could make such a strong appeal to the sense of natural justice of a commanding general that we might induce him to act justly and according to law; no authority, of course, no appeal to a legal standard; only an appeal to the power of military command to do what was right after we had failed to establish a rule requiring him to do what was right. It is the strangest thing in all the world that though I organized all of these board of review, the clemency boards, all the divisions, and so on, not through War Department orders but office orders, and that though this organization was reluctantly assented to or opposed by the Judge Advocate General and the department generally and was criticized by superior military authority on the ground that I was overloading my office, and did not need any such review, the department now relies upon the organization as the saving grace. An acting Chief of Staff told me. "Too many lawyers down there, Ansell; too many." But I organized the board of review in spite of opposition, and the first and second divisions of that board of review, and put the best lawyers I could get there, and then I instructed the board of review to point out all legal errors and to try and establish standards, in accordance with the Grafton decision and the Runkle decision and other decisions, for the government of court-martial procedure, and instructed them again and again to use all the power, the force and the persuasion of logic that they had, and to point to inexpediency when legal argument could not be made to stick, in order to induce these commanding generals to do what was right; and I would like to put in the record those memoranda establishing the office organization.

Senator LENROOT. Very well.

The memoranda referred to are here printed in full, as follows:

ORDERS ORGANIZING BOARDS OF REVIEW IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL.

ANSELL EXHIBIT L.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, August 6, 1918.

There is hereby created in the Military Justice Division of this office a board of review, to consist of such and as many officers of that division as the chief thereof, after conference with the head of the office shall designate. The duties of such board will be in the nature of those of an appellate tribunal and shall be performed with due regard to their character as such. It shall be the duty of the board, under the general direction of the head of this office and the chief of division, to review all proceedings of all general courts-martial received in this office which at present are reviewed in writing. The preliminary review of any such case, after having been made and prepared by the officer to whom the record has been assigned will be transmitted to the board of review, and thereupon the members of said board will proceed to consider the preliminary review jointly and concurrently in the manner similar to that employed by appellate tribunals in reaching and expressing their decision. The board may adopt the preliminary review as its own, may modify or rewrite such review, or may direct that it be modified or rewritten so as to express their views. When a majority or more of the board agree upon a review the review shall show the names of those who concur, but not of any who may dissent, and the review thus agreed upon shall be transmitted to the chief of division, with the record. Any dissenting member may indicate the reasons for his dissent, either orally or in writing, to the chief of division, and in important cases and where he so desires to the head of the office.

The members of the board may consult freely with the officer preparing the preliminary review and the head of the division, and may discuss the case with the head of the office when that course is agreeable to him. It is preferable, however, not to discuss the case with others. When practicable the board will be assigned sufficient room space, clerical force, and any other aid necessary and available.

S. T. ANSELL,
Acting Judge Advocate General.

ANSELL EXHIBIT M.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, November 6, 1918.

The board of review, Military Justice Division, created therein by office memorandum of August 6, 1918. is hereby divided into two divisions, to be known as "The Board of Review, First Division," and "The Board of Review, Second Division." The present personnel of the board will constitute the first division. The Chief of the Military Justice Division will, immediately after consultation with the head of the office, designate the personnel of the second division. The organization, constitution, procedure, powers, and duties of each division will be as prescribed in said office memorandum. Each division will function separately and independently of the other and upon cases assigned it by the chief of division, who will endeavor to see that cases of the same or similar character be referred as far as practicable to the same division.

S. T. ANSELL,
Acting Judge Advocate General.

ANSELL EXHIBIT N.

INSTRUCTIONS TO BOARDS OF RIVIEW TO RECOMMEND CLEMENCY IN CASES UNDER G. O. 7.

For the Chief, Division of Military Justice:

1. No system of administration of justice can be other than patently deficient which does not provide for an expeditious and, at the same time, thorough con-

sideration of clemency; and a system which obstructs or delays the granting of clemency in a proper case is subject to severest criticism.

2. This office has within the organization of the Military Justice Division a clemency section, and this takes care of those cases which arise upon an application submitted by the prisoner himself. But this is not sufficiently general. Frequently it becomes perfectly obvious upon the review of a case in this office upon the receipt of the record, that the penalty is altogether too severe, or that for other reasons clemency ought to be granted and not deferred until an application should come from the prisoner himself. I can conceive of no better time to initiate a recommendation for clemency than upon the completion of the review of a case, when the impression of the incident of guilt is still well defined and the evidence and the circumstances of the commission of the offense are fresh in the mind. This office ought not to be limited in the performance of its functions of review to considering the strict technical question of the legality of the proceedings, but in its capacity as the bureau of military justice it should extend its consideration to include the question of clemency.

3. I have recently been advised that during my absence in Europe, it was held by this office, and the Division of Military Justice so instructed, that the functions of this office, in considering cases coming to it under General Order 7, were to be limited simply to the question of legality of proceedings and were not to be extended to the quantum of punishment and like matters affecting clemency; and that in such cases this office could not with propriety make recommendations to the reviewing authority upon matters of mitigation and remission.

4. While this may be a correct construction of the order, when it is viewed in one light, I do not think it is correct when viewed in the proper light. It could not have been the purpose of General Order 7 to impose a limitation upon this office. I am personally familiar with the origin and the administrative circumstances out of which it arose. Of course, it is to be conceded that it is the function of this office to pass upon an application for clemency after the reviewing authority shall have acted upon the receipts of our review, and his action shall have become final; and inasmuch as our review is now made before his action becomes final, it is seasonable to include within it our views upon matters of clemency. This becomes especially obvious in those cases of dismissal and dishonorable discharge which, when executed by the authorities below, pass beyond the power of clemency; and it was this very class of cases which General Order 7 reaches. If we confine ourselves strictly to the question of legality, while we have thereto assured that the sentence, if executed, is legal, it will at the same time pass beyond all restorative power.

5. I have to advise you, therefore, that hereafter your reviews shall include the consideration of clemency and your recommendations, and where, as in the case of dismissal of an officer, the authority below, even if he has the disposition, has not the power to mitigate, because of the fact that any mitigation must result in commutation, a power exclusively in the hands of the President, you will prepare your recommendation for clemency for direct presentation to the War Department.

S. T. ANSELL.

SEPTEMBER '18.

ANSELL EXHIBIT O.

INSTRUCTIONS UPON THE METHOD OF REVIEW.

JANUARY 3, 1919.

Memorandum for Military Justice Division.

1. I have heretofore advised you frequently and informally, and I take this occasion to advise you more formally, of certain views of mine which I believe to be worthy of consideration and, perhaps, observation by those who have to do with the administration of military justice; indeed, in my judgment, must be observed generally in the establishment, if that administration is to be what justice requires it to be and what thoughtful public opinion would like it to be. I advise you thus that my views may not be misunderstood and that they may furnish you with a general guide in the review of proceedings and constitute your authority for action in which you and others may not personally concur.

2. Courts-martial are courts, tribunals for the doing of justice, as much so as any tribunals in the land, and they must be fairly and impartially constituted and they must fairly and impartially function. Judicial fairness in the case of

courts-martial should be tested not only by the letter of the Articles of War, but by those principles established in our jurisprudence which are designed to secure fair and impartial trial and which are applicable to all hearings of a judicial character.

3. The former military view, which had received in this country considerable judicial support, was that courts-martial performed only executive functions and passed, in an administrative way, upon the military aspect of the misconduct of one subject to military law. The legal view now judicially established is quite the opposite, and is that courts-martial have full and complete jurisdiction over the conduct of all who are subject to military jurisdiction, with full power to try them not only for military offenses, but for crimes against the general public law. This should bring to us in the Army, and most especially to those of us more directly interested in military justice, new appreciations.

Murder, for instance, tried before a court-martial, is none the less than murder tried before a civil court and jury, with none the less serious consequences for society and the accused, and should be tried with none the less thoroughness and fairness. Thoroughness and fairness of courts-martial should be determined with less inclination to regard courts-martial as tribunals sui generis, and with greater regard for those fundamental safeguards with which the law beneficently surrounds every person placed in jeopardy. Articles of War having to do with rights of the accused therefore should be construed, both with respect to what they provide and what they fail to provide, more and more in the light of and in comparison with those constitutional principles which touch the rights of an accused in a criminal prosecution. Those principles should apply to courts-martial, except where clearly inapplicable to the military system.

4. I wish to speak now more specificaly and give the general views above enunciated concrete application:

(*a*) My views are in conflict with the view advanced at times in argument * * * to the effect that in determining the principles of fairness and impartiality to be applied to test courts-martial, those principles should be sought in the analogy of a Roman chancellor or judge. Courts-martial are criminal courts administering criminal law; they consist of from 5 to 13 members, and thus the very law of their constitution denies the analogy of the single trier of law and fact found in Roman jurisprudence, and clearly establishes on the other hand their analogy to the common law court and jury for the trial of criminal offenses; it is in that analogy, therefore, that we must seek the principles by which the fairness and impartiality of courts-martial must be tested. Applying these principles to a case now in hand, they serve, in my judgment, to prohibit the successive trial by the same court of several accused charged with the same or similar offenses, involving the same transaction, state of facts, and evidence.

(*b*) I further disagree with the view that article 37, as it exists in the military code, was designed to have, or does have, the curative effect which the Board of Review seems to me at times to attribute to it. That article does not permit us to register a legal conclusion that there was subsantial error commited, and then to over come it with the personal conclusion of the guilt of the accused gathered out of the entire case. No revisory power and no appellate court should ever reverse or disapprove, except for prejudicial error. The substance of the article appears nowadays frequently in civil codes, in which position it was clearly predicated upon the evil found in the disposition of some appellate tribunals to reverse for meticulous and fanciful errors, and was, therefore, designed to correct a bad judicial habit appearing in some places. It can not be truthfully said that the Army was ever given to meticulous disapproval or that there has ever been a tendency in the establishment to indulge too freely the power of disapproval. The contrary was quite true, in my judgment, and in this view I must think general public judgment concurs. This article, as it appears in the military code, is rather more of a grant of power than a limitation.

(*c*) In my judgment, punishments awarded by courts-martial during this war are properly criticizable in general for their undue and inexplicable severity. Frequently they are such as to shock the conscience. Such punishments violate justice and serve no proper end. They invite and merit public reproach. We frequently have to confess that nobody expects such punishments to be served. Such a confession, while true, is an admission of the injustice of the punishments, and is bound to bring courts-martial into disrepute.

I wish you would help me in determining the course which this office ought to take in making an effort to see that these unjust and severe penalties may be brought within the bounds of reason and justice.

5. The review of proceedings should be expeditious. The result should be made to turn upon substantial error, so tangible that we may have no great difficulty in discovering the principles touching it. To such and not to inconsequential error should our consideration be invited, and upon such should the case turn. With such error, however, justice will not permit us to compromise either by a resort to any assumed curative capacity of the 37th Article of War or any other consideration.

6. My sense of applied law and justice, with which others, of course, may differ, requires me to enunciate these views clearly and unmistakably and ask you to be governed by them until they may be superseded.

S. T. ANSELL,
Acting Judge Advocate General.

Mr. ANSELL. I say that the strange thing is now that the gentlemen who are engaged in defending this system find their chief and almost only support in the fact that this organization of the office was made by me. In justice, look at the Wigmore publication, look at the statements of the Secretary of War, the statements of the Judge Advocate General. Why, they say we have the finest reviewing machinery in the world; that there is no appellate court in the world that goes over a record with such thoroughness.

Senator CHAMBERLAIN. And those were on your recommendation down there and adopted over the protests of the Assistant Chief of Staff?

Mr. ANSELL. That is true; adopted in spite of the contrary desire of military authority. If there was not protest or criticism, there was coolness to it all.

Senator LENROOT. Did you have a formal approval by the Secretary of War?

Mr. ANSELL. No; I just—Mr. Chairman, this is rather difficult to believe at the present time, because it is not in accordance with the usual administration, but in those times in the War Department if you got anything done, you did it, and took the responsibility; and I say that these very agencies, every one of which was organized by me and without help and largely with the hindrance of the War Department, every one of those agencies is now instanced by the War Department as showing the great virtues of this system. Of course, this reviewing machinery is simply standing the pyramid on its pinnacle. They say, "We do not want any lawyers in the courts below. We want the courts to do as they please. We do not want to be governed by legal principles, but when the mass of error finally becomes the scum at the top, we will take it off, there, by our boards of review;" a board that, of course, has no authority. It is nothing in the world but a lot of sophistry and shrewd argument. I say that the cases were not properly reviewed. I say that they were not all reviewed; that there were only a few of them that were reviewed, and that such reviews as were made were frequently ineffectual.

Senator CHAMBERLAIN. You were asked if your course had the approval in this matter of the Secretary of War. Is it not a fact that the Secretary of War—I do not mean this one, particularly, but the Secretary of War—was not accustomed to listen to those in inferior stations, in the Judge Advocate General's office, or in any of the other departments?

Mr. ANSELL. No.

Senator CHAMBERLAIN. So that if you reached him at all, no matter what your recommendation might be, you generally had to go through the Judge Advocate General?

Mr. ANSELL. Yes; you not only would have to go through the Judge Advocate General, Senator, but you would have to go through the Chief of Staff.

Senator CHAMBERLAIN. So that if they desired to withhold any recommendation you made or anything you said, they could do it?

Mr. ANSELL. Yes. It seems to me to be impossible under a scheme of military organization such as we have, for the administrative head to get real facts and real advice. You have got a bureaucracy there; it has been there and is going to be there apparently forever. Along comes the Secretary of War, who of course knows nothing about it, and he is gotten by the bureaucracy just like that [indicating], and just swims along with it.

I remember Secretary Garrison coming there, and with his very large and generous way of doing things he said, "I am the Secretary of War, and anybody who has a complaint or a suggestion to make, even though it be a corporal or a private, can get to me. I will hear him, with such time as I have. That is, the channel to me is free." I remember how everybody laughed at the new Secretary. Well, he may have thought that he was in touch with the Army—the privates and corporals, etc.—But Secretary Garrison could not reverse a machine like that in a moment. Just see what a private or a corporal would have to do in order to get to the Secretary of War—probably an impracticable scheme of administration anyway. He has got to get the consent of his company commander, he has got to get the consent of his battalion commander, he has got to get the consent of his regimental commander, he has got to get the consent of his post commander, he has got to get the consent of his department commander, and then he has got to get the consent of the Chief of Staff.

Senator CHAMBERLAIN. He could not even get past the first sergeant, to begin with.

Mr. ANSELL. Of course not; he could not get past the first sergeant. You have got the first sergeant to pass before you get to any of these others. It is absurd. You can not get to the Secretary of War. I did not get to the Secretary of War; and I did not when I was a brigadier general. They were always pleasant and always glad to see you when you did see them; but you did not get into the Secretary's room except through the Chief of Staff. Probably it will always be so. I think it is unfortunate.

This military system is so hidebound, it is so crystallized, and its channels are so fixed and so easily obstructed, that you do not get very far. The strange thing about our Military Establishment is this: I frequently think of it in my own case. I was not militarily ambitious, and it did not make any difference to me, except that there was a great lesson there.

The Congress of the United States called on a brigadier general, a man who had been acting Judge Advocate General during the war, to come down and testify on a pending bill. He comes down, and it is his disposition to call a spade a spade and speak frankly, which he did. Just before that I had received the distinguished-service medal, the highest honor that can come to a man off the field of battle, and, to drop to the language of the street, I was "the

white-haired willie-boy of the War Department." But when I did my duty before this committee over which you presided, Senator Chamberlain, I was promptly disciplined. But was it because I did not tell the truth? No; nobody said anything about that. It was because I did what I did; it was because I came down here and talked just as I am talking now, as I always talk. Let gentlemen on the other side say what they want to, this was their attitude: "It is because you are divulging the secrets of the system, giving away the system, giving away state secrets, things that we want to keep away from Congress and the public." There is not an institution on earth that so repels public inquiry and public knowledge as the Army of the United States. They come to Congress only when they want something.

Senator CHAMBERLAIN. May I ask something in that connection? Your answer suggests something to me. You indicated having been disciplined yourself. What became of the men in the department who stood by the system and who held lesser rank?

Mr. ANSELL. They have all gone. The last one got his moving orders Saturday morning.

Senator CHAMBERLAIN. No; I mean those who stood in with the system?

Mr. ANSELL. Stood in with the system?

Senator CHAMBERLAIN. Yes.

Mr. ANSELL. Pardon me. They have gone, too. They have gone higher up.

Senator CHAMBERLAIN. They have received promotion?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. And the man who did not stand with the system?

Mr. ANSELL. He has gone, too; down and out.

Senator LENROOT. Do I understand that those who concurred with the views of the department have been promoted, not in the usual order, but outside of the usual method of promotion?

Mr. ANSELL. Yes; I will make this statement, that men who criticized this system, or who sympathized with those who did criticize it, have been subject to the department's gravest displeasure. They have been menaced and threatened and disciplined. And those who take the opposite view and support the system have prospered exceedingly; they have gone up and on. And unless we soon disrupt the system, I do not know how high they will go.

Senator LENROOT. I suppose the testimony of witnesses at the end of the record shows what disposition has been made of them?

Mr. ANSELL. Yes; but, of course, there has not been much testimony on my side of the case, because you must have observed, when I was before you before, I never gave you the name of any man in uniform, because he was not free to testify, and if he had testified he would have been punished. I recall one of the most brilliant lawyers in this country, excepting none whom I know, Col. Morgan, now professor of law at Yale. I embarrassed him very much. I was making a little address before the Commercial Club in this city, and when I got through with it people began to talk about the court-martial system, because the country was interested then, and I hap-

pened to say, "Why do you not ask Col. Morgan about that," a friend of mine sitting over at another table. Morgan got up, and in about one minute stated his views about the court-martial system, not flattering the system, of course.

He was haled before the Judge Advocate General; he was accused of disloyalty to the Army and to the department and to the Judge Advocate General; he was charged with creating general embarrassment, with being a destructive agency, and a letter was read or shown to him requesting an investigation of his conduct by the Inspector General of the Army, preliminary to disciplinary action. They did not take the disciplinary action, but it was obvious that this excellent man was from then on persona non grata in the department. He was a lieutenant colonel, and other men were promoted over him when he was standing at the top by reason of ability and length of service. He was unquestionably at the top in point of ability.

He left here without having been promoted. Others who had no claims were promoted and are still being promoted.

I say those who criticize the system have all gone. They were not rewarded. The last one went yesterday or the day before. He got his orders to walk the plank.

If there was ever one institution in the world that really ought to be thoroughly investigated, in my judgment, it is the office of the Judge Advocate General of the Army. If I can speak impersonally, I think it is safe for me to say this, because I have given evidence of the fact that I am interested in this not personally. I can never profit, whatever you think of this system. I am a civilian, and so I always intend to be. But there are deep things at stake here. You have got to have justice in this Army or you will have no Army. You would have some difficulty in raising an Army now, by reason of the general dissatisfaction of the men with their treatment in the service, more difficulty than you did have when you raised this Army. Injustice reigns supreme in the bureau of military justice itself.

The man who has been the executive officer largely throughout this war was Col. Weeks, a distinguished officer, a colonel, a young man, a lawyer, a graduate of West Point, made executive officer because of his great organizing ability. That office was beautifully organized, not by me but by him. He is a most efficient man. It would have been difficult to run the establishment without him. He fitted into a niche where his absence could not have been well supplied. But he does not believe in the existing system. He disbelieves in it very much; and notwithstanding the fact that that man has had service in the field, as a judge advocate in China, and at the port of embarkation at Hoboken, a very difficult place and very difficult work, and organized this office and was running it smoothly, so smoothly that the papers got out of that office, although it was a law office, more quickly than they get out of any other office in the War Department, due to him and his service, he is now ordered to Charleston, an insignificant place, which, of course, will carry immediate reduction, because the rule is that you can have only the rank that is compatible with the place. He was not ordered in the usual way, as when the head of the office calls in an officer and says,

"Jones, we need an officer some other place, and I give you notice in order that you may arrange your own affairs here and get your family fixed and make the usual personal arrangements"; not that way; not the way of comity and courtesy that should characterize all such actions in such circumstances. No; they wrote out a memorandum for the Acting Judge Advocate General's signature, and they took it personally to the Chief of Staff, all unknown to this officer, and got the "O. K." of the Chief of Staff, and then took it to The Adjutant General and asked him to get out the order immediately, of which this man is all unaware until he gets the telegraphic order.

Now, when he goes to the Judge Advocate General and the Acting Judge Advocate General, they at first undertake to assert that the order is in due course, which, of course, was not true. He was not due for service outside of Washington. He has been here but briefly. He had just come from field service. There was no reason for his removal. They first said, "We are sending you there so that you can get experience on the outside," of which, as I say, he has just had far more than any other man in the department. Then they finally, probably inadvertently, gave the whole thing away. They said, "Well, Colonel, there have been two leaks in this office within the last 10 days, not 4 days apart, and you are too close to the newspaper man who put those leaks in the paper."

Now, what kind of treatment is that? The man said, "I have given out nothing"—as he had not, and as I know that he had not. He knew absolutely nothing about the two things. And yet, because of this arbitrary power and this man's independence and views—he is an officer whose heart is right and whose head is right, and who believes in making this establishment progressive and just—he is to be exiled. He wanted to go to West Point as professor of law, for which he is eminently qualified. No, his views are not right. A man can not be made professor of law at the United States Military Academy now unless he agrees with this system as it is.

Senator CHAMBERLAIN. You speak of your being disciplined. How? Do you mind telling how you were disciplined?

Mr. ANSELL. Personally, I care nothing about that; but it is illustrative of the depths to which our appreciations of justice have gone. I do not think of it as of any personal moment.

Senator CHAMBERLAIN. You are talking now just as you did before, when discipline was used.

Mr. ANSELL. Let us see what happened in that case. You may assume, because it is a fact, there was no officer in the Army more highly respected than I. I was young, vigorous, and active, and was thought very highly of by my fellow officers and by the department—by the present department including the Secretary. On the last day of January they paraded me along with several others.

Senator CHAMBERLAIN. This year?

Mr. ANSELL. Yes; this year; to give me this congressional badge of most distinguished service, reciting in the order my services in a very flattering way, and indicating that I have a far greater capacity than I have. But, nevertheless, this highest distinction in our service was pleasant, and a very beautiful tribute, and received as such on the last day of January.

On the 12th and 14th days of February I testified before your committee on that bill.

Senator CHAMBERLAIN. May I ask you, just right there: You had never talked with the chairman of the committee or to any member of the committee, so far as I knew; and you were subpœnaed before the committee?

Mr. ANSELL. No, Senator; I had never talked to a member of Congress about this system. I must say that I had wanted to, but I did not; neither to Senator Chamberlain nor to anybody else. I was opposed to it; did not like it; would not have minded seeing an investigation; was really glad when Congress did start. But, nevertheless, I did not start it and had nothing to do with it.

Senator CHAMBERLAIN. And at that time you had not discussed it in any way outside of the department?

Mr. ANSELL. Outside of the department?

Senator CHAMBERLAIN. Yes.

Mr. ANSELL. I think not, sir. Sometimes expressions may be dropped at a dinner or socially.

Senator CHAMBERLAIN. I mean in the newspapers?

Mr. ANSELL. No. The department knew where I stood, though.

On the 12th and 14th of February, two weeks after I received the distinguished-service medal, I testified before this committee. The orders were at that time that a man would not be reduced to his Regular Army grade from the National Army grade unless the position that he occupied was abolished or unless he proved incompetent for his place.

On the Saturday morning before the Congress adjourned on March 4 an order was issued demoting me, which was not published until the day after Congress adjourned—demoting me from the grade of brigadier general to the grade of lieutenant colonel, my Regular Army rank; and the newspapers are authority for the statement, and doubtless it is correct, made by the Secretary of War, that my demotion had absolutely nothing to do with my connection with the criticism of the existing system. He did say that.

I was demoted. I was given this distinguished-service medal only two weeks before I testified. I was demoted two weeks after I testified, and in violation of the order of the department that governed demotion. Surely, if I had been found incompetent, the only thing that I had done since I received this highest evidence of competency was to testify. My place was not abolished, because they sent clear to France and got another brigadier general to put in my place. Now, I would not have minded if the Secretary of War had said to the people of the country, "I do not like this man Ansell's attitude; I do not like his views, and he is embarrassing me, and he is embarrassing the administration. I wish he had done otherwise. I do not like his policies." If he had done that, of course, I would have had the utmost respect for that; but to say that I was demoted in due course without connection with this controversy, of course that is not acceptable. That is a statement of official fact that carries no conviction; nobody respects such.

But he said on another occasion that it was in line with the general demobilization of the Judge Advocate General's department; that there were to be no more promotions in that department. There have been more colonels made in that department since I was demoted than before.

Senator CHAMBERLAIN. Who had not been in the service over two years?

Mr. ANSELL. Oh, of course not. Lawyers who had been in the service but a year were promoted above me and put on the clemency board as my seniors, voicing the views of the Judge Advocate General and the Secretary of War, who held me out, however, over my protest, as the president of the clemency board in order that the public might get such assurance as it could out of the fact that I was there.

Senator LENROOT. Was the brigadier general who took your place a temporary one?

Mr. ANSELL. Yes. Of course, it took him away from his office that he understood and brought him to an office that he did not understand and does not understand yet. He knew nothing about it.

Now, aside from the personalities involved in this——

Senator CHAMBERLAIN. I want to get it. I think the country ought to know it.

Senator LENROOT. I think so.

Senator CHAMBERLAIN. Not as affecting you, but as showing the methods of the War Department in this branch of the service; because it may develop later that there are other branches where the same treatment is accorded to efficient men.

Was there not, as a matter of fact, a further effort to discipline you, in the nature of investigation, or otherwise?

Mr. ANSELL. Yes. It is rather difficult to speak patiently about such pettiness.

Senator CHAMBERLAIN. I think the chairman would like to know about it, too.

Senator LENROOT. I would be very glad to have you state frankly the whole situation.

Mr. ANSELL. If such tyrannous conduct can never occur again, this information will not have been in vain. See what happened. They demoted me, took me from the head of the office to the very bottom, because that is where they placed me. The other chiefs and assistant chiefs of the division of course had temporary rank, although they were not regular officers. They were new men. They put me at the bottom. And yet, Mr. Chairman, I sat there and did exactly the duty which I had ever done, except signing my name, which was signed by another man; and yet, in spite of that, the Secretary of War and the Judge Advocate General of the Army and Prof. John H. Wigmore, after brief service made a colonel in the department, met. Did they take this attack, as they call it, as they ought to have taken it? The attitude of the Secretary of War, the guardian of the rights of every man in the Army, should have been one of inquiry into this thing. "What does it mean that this brigadier general, an officer of good standing, should go down there and testify before that committee as he has? What does it mean when Members of Congress and Senators, speaking from their positions in the Congress, make these statements here? What does it mean when there is this uncertainty in the country about the administration of military justice? What is my duty as the public official at the head of this great department?" Why, it naturally would occur to a faithful official to investigate. He should be alert to do

so. Even if the complaint should be found to be not justified, it was his duty, so long as it carried the prima facies with it, to investigate.

No. They met, these three men, and they decided upon a plan of campaign to maintain and defend the existing system at all costs, and discredit the complaints and destroy the complainants.

Senator CHAMBERLAIN. Who were the men? You mentioned them a while ago.

Mr. ANSELL. They were Mr. Baker, Gen. Crowder, and Prof. Wigmore.

The first thing done publicly was a statement for the press, devoted largely to discrediting me. They did not deny what I said before your committee, except in certain personal respects, such as that I had not been relieved from supervision of military justice because of my views, though it was admitted that I had been relieved without assigned reasons. It was stated that I had been treated—my views—with every consideration. The statement went on. It suggested that I wanted to be Judge Advocate General of the Army, a thing which every friend of mine in the world knows that I have never wanted to be, although it would have been a legitimate ambition. It is generally known that I should have been out of the Army before this if it had not been for the war.

Senator CHAMBERLAIN. I will say in your behalf in that regard that you have expressed the desire that Gen. Crowder might be heard first; but you wanted to be heard and to say what you had to say before the committee.

Mr. ANSELL. Yes; I think I have been fair. But they said that by surreptitious methods I tried to get myself appointed Acting Judge Advocate General, the emphasis being on the surreptitiousness. The facts are that my regular assistant, a Regular Army officer, Col. White, came to me and said, "Ansell, you are exercising a lot of authority here and signing your name as 'Acting Judge Advocate General,' and you have no authority to do it." He pointed out section 1139 of the Revised Statutes, and I examined it, and I said, "I think you are right." On that very afternoon I called up Gen. Crowder over the telephone, but could not get him, and, inasmuch as I was leaving the office, I dropped him a note, not formal, and told him that this had been brought to my attention and that I could not be Acting Judge Advocate General in charge of the powers and policies of that office unless I was designated under the statute; that merely succeeding as the senior could not authorize me to do those things. When the next senior comes into a place temporarily, briefly, for a day or two while the senior is temporarily absent, he has nothing to do with policies. When you are going to hold on day in and day out and month in and month out you can not do it by virtue merely of seniority. Gen. Crowder, when he left the office, had told me that he did not want to come back to take charge. He was then Provost Marshal General, and he was liaison officer between the department and Congress, and he was war councillor—three fields, either one of which was probably a full-sized man's job. But when this was called to my attention I dropped him this note and said, "What do you think about it?" He wrote back saying, "I fully agree with you, and you present the case directly to the Secretary of War." He now puts

the emphasis on the word "directly," and says because I did not present this case directly to the Secretary of War I am guilty of surreptitious conduct. Now, what was done, and all that was done, was for me to address a brief and simple memorandum to the Chief of Staff of the Army, who, under orders, is the channel for communication, just as I addressed everything except where the Secretary of War had personally taken up the matter with me or had personally directed otherwise because of his personal interest in it. The Chief of Staff is legally and de facto the alter ego of the Secretary of War, and to him we address all these communications.

Senator CHAMBERLAIN. If you had done otherwise you would have violated the rule?

Mr. ANSELL. I would. I simply sought the views of the Judge Advocate General, and his response seemed to me to be reasonable and in line with what he had already said and done.

So I made this brief memorandum to the Secretary of War through the Chief of Staff, saying that I seemed to be charged with the policy and output of the office, and it seemed to me under the statute I should be designated as acting chief of the bureau by the President, in order that I might have this authority under the statute, as my senior assistant had suggested; and my final sentence was: "I am authorized to say that the Judge Advocate General of the Army concurs."

He comes back with what I think must be designated as a mere quibble. He says that he did not want me to be designated as Acting Judge Advocate General. He did not want to be dispossessed. He wanted to be Judge Advocate General and Provost Marshal General and war councillor and all of the other things; which I did not know. And I judged what he wanted by his language, and it was a full concurrence with my suggestion. I say that I never spoke to the Chief of Staff or any other human being, except in this communication, to have me designated as Acting Judge Advocate General; and yet he calls that surreptitious.

Now, they got together and published this document accusing me of wanting to succeed, and wanting to succeed by surreptitious methods, and gave it to the papers—the Associated Press and all of them—all timed for the usual Monday morning fulmination. It had been held there two or three days and sent out everywhere, with great headlines, about me. All of this was done by the Secretary of War, who invited it by writing a letter to Gen. Crowder as a vehicle upon which this letter of Gen. Crowder's could travel. The Secretary did not say, "Let us investigate what Ansell and Senator Chamberlain and members of the House and people over the country are saying." He did not say that. He said, "General, I know that the system is a good system. I am absolutely assured that it has not done injustice during the war, but my own personal assurance is not sufficient. I want you to make such a statement as you can make that will assure the people of the United States, who are anxious about their sons in the service, that no injustice has been done. We must repel this attack that has been made upon us and give the people assurance."

Senator CHAMBERLAIN. That was his letter to Gen. Crowder?

Mr. ANSELL. Yes; and he said, "Please make the statement immediately." And the statement was made immediately that the system was splendid; that it had virtues that few human institutions have; and then it devoted itself largely to destroying me for bringing to the public, as I have had to do, the situation. And then, not content with what they gave to the press, but in accordance with the plan, they published this 70-page document here, which was an elaboration of the statement that was given to the press, in itself a long one, written by Prof. Wigmore.

This conference between the Secretary, Gen. Crowder, and Col. Wigmore that I told you about established a propaganda bureau, in which Prof. Wigmore was the chief. There were several officers and 13 or 14 clerks assigned solely for this purpose, and the Government of the United States paid their salaries.

The bureau got out this very elaborate statement, which is devoted to encomiums upon the system, and then concludes, as the other did, by calling the attention of the public to my surreptitious conduct, adding here another gross example of "surreptition," which is this: that in the fall of 1918, after I had returned from France, I recommended that the revisory power that was being exercised by General Kreger, representing our office in France, should be increased and made more effective. I did, and there in that order, the draft of the order prepared by me, I made the ruling of the Acting Judge Advocate General for that force in France final over any commanding general unless the commanding general appealed to the Secretary of War, when of course the Secretary's decision upon a matter of law would be final; and they say that I was disloyal to the Secretary of War therein, because I knew that he had decided that the commanding general himself would be final. The Secretary of War had decided, apparently after much wobbling, that the commanding general himself would be final, but from time to time, in hard cases and as a result of my insistance, that had been broken down, and I thought the time was ripe to break it down entirely—I speak frankly—over there, a place far removed from the seat of Government in Washington, and where men could be hanged for rape, for instance, upon the testimony of the women of a race whose language we did not understand and whose customs we did not know; at any rate, far removed from the seat of government here, where the President and the Secretary of War might act. I said that the ruling of the Judge Advocate General upon questions of law would be final unless the commanding general besought the Secretary of War for reversal. They say that that was disloyal, and that it was gained by surreptition. There, again, I did no more than frankly and in so many words put in the draft of an order, and wrote a memorandum to support it and sent all to the Chief of Staff, openly and above board, as the regulations require, and heard no more of it until the order was published. If that is surreptition, it is surreptitious to do business in the War Department through its prescribed channels, and in the prescribed way, and that is all there is to it.

That lengthy pamphlet was gotten out. There were 90,000 copies of this pamphlet published and sent to all the lawyers, preachers, and other professional men as part of the propaganda to maintain this

system and to discredit those who would attack it. I wish to say to you, Mr. Chairman, that the records of the cases cited will prove that the Secretary of War and the Judge Advocate General of the Army have resorted to methods which, if adopted by a man in his dealings with another man privately, would merit and receive the severest condemnation. The truth is not in that document, and the records will prove that the truth is not in that document. The cases that they cite here are not only not fairly handled, they are falsely and untruthfully presented here, all with the purpose that the Congress of the United States and the lawyers of the United States might be misled and deceived. It is a sordid story, in my judgment, doing this department of the Government little credit.

Senator LENROOT. What is the title of that pamphlet?

Mr. ANSELL. It is entitled "Military Justice During the War."

(At 1.30 o'clock p. m. the subcommittee adjourned until to-morrow, Wednesday, August 27, 1919, at 10 o'clock a. m.)